Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

SUN PRAIRIE, A PARTNERSHIP,

Petitioner,

v.

NEAL A. McCALEB, ASSISTANT SECRETARY – INDIAN AFFAIRS, GALE A. NORTON, SECRETARY OF THE INTERIOR, ROSEBUD SIOUX TRIBE, CONCERNED ROSEBUD AREA CITIZENS, SOUTH DAKOTA PEACE AND JUSTICE CENTER, PRAIRIE HILLS AUDUBON SOCIETY, and HUMANE FARMING ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An Indian tribe may lease land to a non-Indian party with the approval of the Secretary of the Interior or her designee pursuant to 25 U.S.C. § 415. The Secretary of the Interior must likewise approve any agreement that encumbers Indian lands for that agreement to be valid under 25 U.S.C. § 81. The question presented is:

> Once a lease of Indian lands to a non-Indian party has received federal approval under 25 U.S.C. §§ 81 and 415, does that non-Indian party have prudential standing to challenge a federal agency's attempt to void the lease by unilaterally withdrawing the previous federal approval.

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Petitioner Sun Prairie, A Partnership, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 286 F.3d 1031. The opinion of the district court (App. B) is reported at 104 F. Supp.2d 1194.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 5, 2002. The court of appeals denied a timely petition for rehearing on August 14, 2002. (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of Title 25 of the United States Code, Sections 81 and 415, are set forth in the appendix. (App. D).[1]

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1. Section 81 was revised in 2000 by Pub. L. No. 106-179, 114 Stat. 46; Section 415 was amended in 2000 by Pub. L. No. 106-216, 114 Stat. 343. Both pre- and post-revision versions are reproduced in the Appendix. While the legislative history surrounding the revision to Section 81 provides insight into the intent of Congress when it originally promulgated these statutes and how the statutes have operated in practice (as discussed and cited briefly *infra*), neither change impacts the question presented here.

STATEMENT OF THE CASE

This case involves a lease on tribal trust property between an Indian tribe – the Rosebud Sioux Tribe ("Tribe") – and a non-Indian party – Sun Prairie, A Partnership ("Sun Prairie"), which lease was federally approved as required by law. The question posed is whether a non-Indian party to such a lease has prudential standing to challenge a federal agency's attempt to void the lease, after the non-Indian party is in possession of the leased property, by unilaterally withdrawing its previous approval.

In 1998 Sun Prairie and the Tribe entered into a 15-year lease ("Lease") as part of a hog farming operation. The Lease gave effect to the agreement between the Tribe and Sun Prairie to develop up to thirteen (13) hog-raising facilities on Tribal trust land in South Dakota (the "Project"). The Project, as approved by the parties, included plans for state-of-the-art facilities, with private investment of more than $100 million and employment of over 200 permanent employees on the Rosebud reservation, which the record in the trial court reflects is a severely economically depressed area with almost 90 percent unemployment, more than 43 percent of families below the poverty level, and a per capita income of less than $7800.[2]

Because the Lease involved Indian lands as defined by Title 25 of the United States Code, the Lease was

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2. *See also* U.S. Census Bureau; *Income and Poverty in 1999: 2000, (Table) GCT-P14, Data Set: Summary File 3 (SF 3); Geographic Area: United States-American Indian and Alaska Native Area, and Alaska Native Regional Corporation* (last visited November 6, 2002) <http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF3_U_GCTP14_US14_geo_id=01000US.html>

subject to approval by the Secretary of the Interior or an authorized designee (in this case the Bureau of Indian Affairs). *See, e.g.*, 25 U.S.C. §§ 1(a), 81, and 415. Acting pursuant to these statutes, the BIA approved the Lease on September 16, 1998. This approval came after the completion of environmental review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and the BIA's issuance and publication of a finding of no significant impact for the Project, which meant that the Project would not have a significant effect on the human environment and therefore required no further environmental review. *See* 40 C.F.R. § 1508.13. The BIA rules allow any interested party to challenge or appeal from a lease approval within 30 days, 25 C.F.R. Part 2, but no such challenge or appeal was taken by anyone.

Once the Lease approval became final, and in reliance on its rights under the approved Lease, Sun Prairie was given access to and possession of the subject property by the Tribe and immediately began work. Within the first few months, Sun Prairie spent several million dollars in constructing the first farm of the Project. Eventually, prior to the court of appeals' ruling presented here for review, Sun Prairie secured bank financing to construct a state-of-the-art agricultural facility, invested millions of dollar in private funds with no government subsidy, spent over $20 million building physical improvements, completed construction of two farms, together comprising 48 buildings with an overall capacity of 96,000 hogs at any one time, and employed tribal and non-tribal employees (reaching an average of 40 permanent employees, almost all of whom are tribal members, for ongoing

operations; and over 100 workers, mostly tribal members, during construction).[3]

On November 23, 1998, some 2½ months after the BIA's final approval of the Lease, after several million dollars had been spent, and after work on the Project was well underway, a group of Project opponents, led by animal-rights activists in California and Colorado, filed suit against the BIA in federal district court for the District of Columbia (the "D.C. litigation"). These opponents, who eventually became the Intervenor Defendants in the case below and are among the Respondents here, had participated in the Lease approval process described above by submitting comments to BIA but never challenged or appealed the Lease approval. Now, however, they sought to overturn the Lease approval and enjoin development of the Project through the D.C. litigation, alleging that NEPA procedures had not been followed. Neither the Tribe nor Sun Prairie were made parties to the D.C. suit.

The BIA filed an answer in the D.C. litigation on January 26, 1999, denying that any NEPA violations had occurred. Less than 24 hours after filing the answer, however, and after reaching an oral agreement to settle the case with the Project opponents, Kevin Gover, then-Assistant Secretary – Indian Affairs, issued a seven-sentence letter in which he claimed unilaterally to void BIA's approval of the Lease on the purported ground that the agency had failed to comply with

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3. This Rosebud investment is part of a credit facility in excess of $40 million, secured by, among other things, personal guarantees of the Sun Prairie individual partners and leasehold mortgages held by several banks. The Project, when fully built, contemplates a private investment in excess of $100 million.

NEPA. (App. E). The D.C. complainants and the BIA filed a joint stipulation of dismissal without prejudice, which was entered by the district court, disposing of the D.C. litigation.

Prior to its agreement to settle with the D.C. complainants, the BIA had repeatedly urged both the Tribe and Sun Prairie to stay out of the litigation for "tactical" reasons. Sun Prairie initially honored this request but later became aware that the BIA was having settlement talks with the D.C. complainants from which Sun Prairie and the Tribe were being excluded. Sun Prairie ultimately filed a motion to intervene, but before the court could address the intervention on its merits, the BIA issued its January 27th letter claiming to void the Lease and executed the joint stipulation for dismissal. The district court then denied Sun Prairie's motion as moot concurrent with its dismissal of the D.C. litigation.

The BIA's letter purporting to "void" the previously approved Lease came without any hearing or administrative proceeding, without any notice to Sun Prairie, without any opportunity for Sun Prairie or the Tribe to participate or be heard, and without following established BIA procedures for revocation or cancellation of a lease. The regulations, 25 C.F.R. Part 162, would have required notice, an opportunity to be heard, and appeal rights.

In response to the BIA's letter purporting to void the Lease, Sun Prairie and the Tribe immediately filed suit in the U.S. District Court for the District of South Dakota. The complaint sought judicial review of the agency's action under the federal Administrative Procedure Act, 5 U.S.C. §§ 701-

706, and alleged violations of, among other things, Sections 81 and 415 of Title 25 of the United State Code.[4]

Sun Prairie and the Tribe initiated the South Dakota suit as co-plaintiffs against Mr. Gover, then-Assistant Secretary – Indian Affairs, and Bruce Babbitt, then-Secretary of the Interior (the "Federal Defendants"),[5] arguing that the Federal Defendants acted without any authority when they published the letter purporting to revoke the earlier approval, thus voiding the Lease. The Federal Defendants argued that they had "inherent authority" under 25 U.S.C. §§ 81 and 415 unilaterally to reconsider and revoke their lease approval decisions after the fact and outside of recognized statutory or regulatory procedures. Certain interest groups[6] sought and were granted leave to intervene as defendants in the district court (the "Intervenor Defendants").

After a full trial on the merits, the district court agreed with Sun Prairie and the Tribe, and entered an order that enjoined the Federal Defendants' unauthorized actions in attempting to void the Lease. The court determined that "the Assistant Secretary's actions were arbitrary, capricious,

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4. Additional statutes relied upon by the Tribe and Sun Prairie included NEPA and the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq*. The district court had jurisdiction based on 28 U.S.C. § 1331.

5. The court of appeals substituted current officeholders in the caption pursuant to Fed. R. App. P. 43(c)(2). A similar substitution has been made for this petition pursuant to this Court's Rule 35.3.

6. Concerned Rosebud Area Citizens, South Dakota Peace and Justice Center, Prairie Hills Audubon Society, and Humane Farming Association.

an abuse of discretion and otherwise not in accordance with the law," and also held that "his actions were unlawful under the doctrine of equitable estoppel, this being the rare case for the application of such doctrine against the federal government." (App. 38a). Among other things, the court found:

> [T]he Assistant Secretary's unilateral decision to void the lease, with or without authority, after the period within which to appeal had expired, without providing any findings of fact or conclusions of law to justify or explain his decision, and without extending adequate due process to plaintiffs constitutes the requisite "affirmative misconduct" [for equitable estoppel against the government]. Further affirmative misconduct occurred in the Assistant Secretary filing a pleading in federal court one day and the next day taking the very opposite position, especially after having not reviewed any significant portion of the administrative record.

See 104 F. Supp.2d at 1205-6 (App. 38a). The Federal Defendants and the Intervenor Defendants appealed the district court's permanent injunction. No stays, however, were sought by any party pending appeal; accordingly, the construction already underway on the two original farms for the Project was completed, and the farms continued to operate.

During the appeal, the Tribe moved to realign as an appellant. This occurred after a tribal election victory by a group that no longer favored the Project. Over Sun Prairie's

objection, the court of appeals granted the Tribe's realignment motion, leaving Sun Prairie as the sole plaintiff-appellee. Also on appeal, Intervenor Defendants raised for the first time the issue of Sun Prairie's prudential standing – this issue not having been raised at any time, by any party, during the district court proceedings.[7]

Argument was heard on the appeal of the permanent injunction in February 2001. Fourteen months later, on April 5, 2002, the court of appeals issued its decision, holding that Sun Prairie lacked prudential standing to challenge the BIA's action when it attempted to void the Lease. The court of appeals recognized that Sun Prairie had "considerable" interests involved, (App. 9a), that these "interests . . . are threatened by the Assistant Secretary's actions," (App. 7a), and that it was "concede[d] that Sun Prairie has satisfied the constitutionally-mandated elements of standing," (App. 6a). Nonetheless, with regard to Sun Prairie's claims under Title 25 of the United State Code, the court of appeals held that Sun Prairie lacked prudential standing because "Sun Prairie's asserted interests, while considerable, are not arguably with the zone of interest to be protected or regulated by the Indian statutes." (App. 9a). In support of this holding, the court offered the following rationale:

> Because the statutes relied upon by Sun Prairie were enacted to protect Indian interests, we believe it would be inconsistent to interpret them

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7. Since it was not raised before the district court, Intervenor Defendants' prudential standing argument should not have been entertained on appeal. *See Pershing Park Villas Homeowners Ass'n v. United States Pacific Ins. Co.*, 219 F.3d 895, 899-90 (9th Cir. 2000), *citing Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1995).

> as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribes' interest.

(App. 9a).

Sun Prairie sought en banc reconsideration of this determination. Notably, the Federal Defendants (although adverse to Sun Prairie on the merits of the underlying action) agreed with the request for reconsideration of the panel's prudential standing determination, advising the court of appeals that:

> We agree that Sun Prairie possesses prudential standing under the particular statutory provisions at issue, 25 U.S.C. 81 and 415, insofar as the Secretary of the Interior has invoked the authority under these provisions to reconsider the initial lease approval. . . .
>
> . . . We believe the Court should now hold that Sun Prairie does have prudential standing.

Federal Appellants' Response to Sun Prairie's Petition for Rehearing En Banc ("Fed. En Banc Resp.") at 3, 7. Nonetheless, the court of appeals denied the petition for rehearing, with one judge dissenting. (App. C).

REASONS FOR GRANTING THE PETITION

This case presents a fundamental question concerning commercial development on Indian land: whether a non-Indian party to a federally approved lease of tribal trust land has standing to challenge federal agency actions attempting

to invalidate that lease by unilaterally withdrawing the federal approval after the non-Indian party is in possession of the leased property. The court of appeals' answer is that the non-Indian party has no standing even to assert that challenge, an answer that runs afoul of this Court's precedent (explained in more detail in Section B below). The court of appeals' decision of course has very serious consequences for Sun Prairie and others involved in the Project, including the loss of local (mostly tribal) jobs, default on over $40 million of loans, the loss of leasehold mortgages held by multiple lenders, and the ripple effect of Project shutdown on suppliers and those companies who have contracted to receive hundreds of thousands of hogs from the Project annually. Most importantly, it has grave implications for the future commercial development of tribal trust property nationwide.

I. THIS CASE CONCERNS A THRESHOLD QUESTION OF FUNDAMENTAL IMPORTANCE TO THE DEVELOPMENT OF TRIBAL TRUST PROPERTY

The Executive Branch, the U.S. Congress, tribal governments, and the private sector have worked for decades to create business-friendly environments on Indian reservations to spur economic development there. Because of a perception that many Indian tribal governments do not have the legal infrastructure to make agreements enforceable and to guard against unreasonable regulation of business operations, many in the private sector have been reluctant to invest in and do business on Indian lands. In response, federal and tribal governments have encouraged the adoption of tribal laws and the establishment of dispute resolution mechanisms and reliable regulatory schemes. These actions have begun

to elicit a belated but growing infusion of private sector capital and commercial activity on Indian reservations in recent years. This economic development approach has been a bipartisan federal policy for the past several decades, and strong support for Indian reservation economic development continues to be a keystone of that policy.[8]

In addition to Executive Branch policy, several statutes specifically charge the United States with the duty of fostering and supporting economic development on Indian reservations. *See* Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.*; Indian Financing Act, 25 U.S.C. §§ 1451 *et seq.*; Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*; Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*; Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101; Native American Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. §§ 4301 *et seq.*

The Native American Business Development, Trade Promotion, and Tourism Act of 2000 is the most recent statement of the federal policy favoring economic development on Indian lands. It expressly recognizes that the interests of private sector partners of Indian tribes are among the interests to be protected. In this Act, Congress found that –

> (T)he capacity of Indian tribes to build strong and vigorous economies is hindered by the inability

8. *See, e.g.*, Presidential Proclamation No. 7500, 3 C.F.R. 305, 306 (2001) ("My Administration will continue to work . . . to provide Native Americans with new economic and educational opportunities. . . . We will . . . help to stimulate economic development in reservation communities.").

> of Indian tribes to engage communities that surround Indian lands and outside investors in economic activities on Indian lands.

25 U.S.C. § 4301(a)(7).

Congress in the same Act declared as federal Indian policy that –

> (T)he United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to – (A) encourage investment from outside sources that do not originate with the tribes; and (B) facilitate economic ventures with outside entities that are not tribal entities;
>
> (T)he economic success and material well-being of Native American communities depends on the combined efforts of the Federal government, tribal governments, the private sector, and individuals. . . .

25 U.S.C. § 4301(a)(9-10).

Congress declared that the purpose of this Act was –

> (1) To revitalize economically and physically distressed Native American economies by – (A) encouraging the formation of new businesses by eligible entities, and the expansion of existing businesses; and (B) facilitating the movement of goods to and from Indian lands and the provision of services by Indians.

> (2) To promote private investment in the economies of Indian tribes. . . .

25 U.S.C. § 4301(b)(1-2).

Clearly, it is in the interest of both the United States and of the Indian tribes to promote the reliability, predictability, and enforceability of commercial agreements between non-Indian investors and Indian tribes.

In the instant case, the court of appeals' decision has severely undermined all of these efforts in a stunningly ironic fashion. Instead of tribal law or tribal courts failing a non-Indian investor, it is federal law and the federal courts that cannot be relied upon even to provide a forum for a challenge to unilateral action taken by federal officials. As a consequence, prudent private sector financial interests will not venture near Indian reservations if the conduct of business thereon is conditioned on a federal approval, since, under the court of appeals' ruling, that approval can be removed at the arbitrary and capricious whim of a federal official, without legal cause or authority, without notice and due process, and with no accountability to law or policy.

Because the court of appeals' ruling directly undermines federal policy, it is important. Because, as the next section will show, the decision is based on a failure to follow this Court's precedents, it is precisely the type of important lower court decision which this Court should review.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S PRECEDENT

This Court has explained that "[t]he question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). All concede that Sun Prairie has constitutional standing under Article III. The sole question presented is whether Sun Prairie has prudential standing.

For prudential standing, a plaintiff who challenges government action under the Administrative Procedure Act, 5 U.S.C. § 702, must state an interest "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *See Ass'n of Data Processing Service Orgs. Inc. v. Camp*, 397 U.S. 150, 153 (1970). The "arguably protected by" and "arguably regulated by" prongs of the test are disjunctive, and a party can gain standing by satisfying either. *See, e.g., Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989). The zone of interest test "is not meant to be especially demanding." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987).

With respect to Sun Prairie's standing under Title 25, the court of appeals misapplied the "zone of interest" test in at least two respects: (1) it ignored the "arguably regulated by" prong of the zone of interest analysis, and (2) it failed to consider the interests of Sun Prairie, which are protected under the statute.

A. Sun Prairie Has Standing As A Regulated Party

A party regulated under a statute has standing to challenge decisions made under that statute. *See Data Processing*, 397 U.S. at 153. The rationale for this ruling is clear:

> As a general matter, there are two types of parties with the right incentives to police an agency's enforcement of the laws it administers. First, those whom the agency regulates have the incentive to guard against any administrative attempt to impose a greater burden than that contemplated by Congress. Second, those whom the agency was supposed to protect have the incentive to ensure that the agency protects them to the full extent intended by Congress.

Hazardous Waste Treatment Council, 885 F.2d at 922, *citing Clarke*, 479 U.S. at 397, 399.

At the heart of the prudential standing analysis at issue here is the difference between a "would-be" lessee – that is, a non-Indian party seeking to enter into a lease controlled by 25 U.S.C. §§ 81 and 415 but not yet approved – and an "actual" lessee – a party that has entered a lease after all appropriate governmental approvals. Some jurisdictions have found that a "would-be" lessee lacks prudential standing to challenge a decision by the Department of Interior not to approve a lease on Indian lands. *See, e.g., Sessions Inc. v. Morton*, 348 F. Supp. 694, 700 (C.D. Cal. 1972), *judgment aff'd*, 491 F.2d 854 (9th Cir. 1974).

Once the lease is approved, however, that status changes fundamentally. At that point the non-Indian party has become an actual lessee and is therefore actually regulated by the suite of statutes and regulations that control the lease (including, in this circumstance, Sections 81 and 415 of Title 25 of the United States Code, and 25 C.F.R. Part 162). Under Title 25, a non-Indian entity must obtain a BIA-approved lease before taking possession of tribal trust land. The BIA then ensures, through its powers to inspect and to enforce, that both parties comply with the lease terms; BIA rules also set forth requirements the agency must follow to revoke or cancel a lease.[9]

These laws and regulations provide both Indian and non-Indian parties with a process to assure compliance with the lease and set forth procedural and substantive standards that the BIA must follow in exercising its regulatory duties. (Indeed, a pernicious effect of the court of appeals' decision

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9. This is true under both the pre- and post-amendment versions of §§ 81 and 415 (App. D) and the implementing regulations. *Compare* 25 C.F.R. Part 162 (1998) (providing that BIA (i) had power to enforce terms of lease and take action upon violation of lease, *see* § 162.14; (ii) could require non-Indian lessee to provide surety bond and pay fees in addition to rental payments, *see* §§ 162.5(c) and 162.13; and (iii) had oversight and approval power over subleases, assignments and other encumbrances), *with* 25 C.F.R. Part 162 (2002) (providing that BIA (i) has power to ensure non-Indian tenants meet payment obligations and operating requirements through inspection and enforcement, *see* § 162.108; and (ii) may take action to recover possession from tract occupied without appropriate authorization, *see* § 162.106). *Compare also* 25 C.F.R. Part 162 (1998) (providing that BIA, among other things, must provide (i) written notice of any violation, *see* § 162.14; (ii) a reasonable opportunity to cure or provide reasons why the lease should not be cancelled, *id.*; and (iii) written notice of appeal rights, *id.*), *with* 25 C.F.R. §§ 162.618-619 (2002) (same).

is that it encourages the BIA not to follow its own revocation and cancellation rules: under the lower court's holding, the effect of failure to follow BIA revocation and cancellation rules is to render the non-Indian party without standing to challenge the voiding of the lease, whereas, under BIA procedures, there must be notice, an opportunity to be heard, and appeal rights. *See* 25 C.F.R. Part 162.)

Sun Prairie is, in fact, not only directly regulated by the BIA under Title 25, it also has contracted with a party that is directly regulated (the Tribe). The "regulated by" prong of the test covers both those entities directly regulated *and* those who contract with regulated parties. *Cotovsky-Kaplan Physical Therapy Associates, Ltd. v. United States*, 507 F.2d 1363, 1367 (7th Cir. 1975), *quoting Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 422 (1942).

In sum, once BIA's lease approval has become final, the non-Indian party to the lease, just like the Indian party, is "regulated" under Title 25; both parties have an interest that the lease not be voided haphazardly by a federal agency, and both have an interest in the opportunity to be heard regarding any contemplated action to void the lease. *See Bennett*, 520 U.S. at 176; *see also Stock West Corp. v. Lujan*, 982 F.2d 1389, 1397 (9th Cir. 1993) (holding a non-Indian party to a contract controlled by § 81 had prudential standing to challenge the agency's refusal to hear the merits of its administrative appeal). It therefore follows that, once a lease has been approved, if the government later seeks to void the lease, a non-Indian party who is an actual lessee has prudential standing to defend the lease under the "arguably regulated by" prong of the zone of interest test.

The Secretary of the Interior and the Assistant Secretary – Indian Affairs, the federal officials charged with implementation of the statutes at issue, agree with this analysis, and so stated in the court below:

> [R]egardless of the fact that Sun Prairie would not have had prudential standing to challenge an initial decision not to approve the lease under the explicit terms of 25 U.S.C. §§ 81 and 415, we believe that it did have prudential standing to challenge the decision to withdraw the initial lease approval under those statutory provisions' implicit terms.

Fed. En Banc Resp. at 7.

The court of appeals simply, and impermissibly, ignored the relevant legal question,[10] namely, whether the interest of a lessee in a BIA-approved lease, as a party affected by BIA

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10. None of the cases cited by the court of appeals reached or even involved the "regulated by" prong of the prudential standing analysis in a context where a non-Indian lessee sought to defend its leasehold interest after the agency's approval of the lease under § 415 had become final. *See Schmit v. Int'l Finance Management Co.*, 980 F.2d 498 (8th Cir. 1992) (plaintiff was not a party to the contract at issue); *Webster v. United States*, 823 F. Supp. 1544, 1545 (D. Mont. 1992) (same); *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1054 (10th Cir. 1993) (contract was between private entities and no BIA approval had been given or was required); *San Xavier Dev. Auth. v. Charles*, 237 F.3d 1149, 1151-52 (9th Cir. 2001) (transaction was a sublease between non-tribal parties for which no BIA approval had been acquired); *Chuska Energy Co. v. Mobil Explor. & Produc. N. Am., Inc.*, 854 F.2d 727, 729 (5th Cir. 1988) (addressing the removal of a state-court action involving the sublease of a mineral agreement under 25 U.S.C. § 396d).

action purporting to exercise regulatory power under Title 25, is "arguably in the zone of interest that is . . . regulated by" that statute. *Data Processing*, 397 U.S. at 153. The answer is clearly yes, and the court of appeals erred in not so holding.

B. Sun Prairie Has Statutorily Protected Interests

A "protected interest" also enjoys standing under the *Data Processing* test. 397 U.S. at 153. Such an interest, however, does not equate to the concept of a "benefited party" under a statute, and only the former is required to satisfy prudential standing. For a plaintiff's interests to be "arguably within the zone of interest" there need not be an "indication of congressional purpose to benefit the would-be plaintiff." *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492-93 (1998) (holding that although the Federal Credit Union Act was passed to establish a place for credit unions within the country's financial market and banks were not intended beneficiaries, banks had standing to sue under the act because it impacted their economic interests). This Court has clearly defined the appropriate inquiry:

> [I]n applying the "zone of interest" test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interest "arguably . . . to be protected" by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them.

Id. at 492.

Here, the court of appeals found that Title 25, including specifically §§ 81 and 415, was intended to protect Native Americans, and therefore could not provide a basis for prudential standing for a non-tribal party:

> Because the statutes relied upon by Sun Prairie were enacted to protect Indian interests, we believe it would be inconsistent to interpret them as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribes' interest.

(App. 9a). This analysis mistakenly looked exclusively at the intended beneficiaries of the statute (and even then too narrowly), not the nature of the interests arguably protected.

The legislative history of the Indian Long-Term Leasing Act, codified as amended at 25 U.S.C. §§ 396, 415-415d, evidences a strong federal intent to promote economic development on tribal land. *See, e.g.*, H.R. Rep. No. 84-1093, at 2691-92 (1955) (justifying the expansion of leasing authority, in part, by the fact that private-party lessees would be unwilling to undertake expensive improvements unless "guaranteed tenure by a long-term lease").[11] Indeed, the

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11. Equally compelling is the legislative history under the recent Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, 114 Stat. 46, which reiterates the policy to encourage Indian economic development and to provide for the disclosure of Indian tribal sovereign immunity in contracts. *See, e.g.*, H.R. Rep. No. 106-501 (2000), *reprinted in* 2000 U.S.C.C.A.N. 69-74.

approval considerations mandated by §§ 81 and 415 explicitly benefit and protect both the tribal and non-tribal parties to a lease.[12]

Nothing in Title 25 indicates a congressional intent to preclude review of the Assistant Secretary's action by a non-Indian party. Rather, there is "sound reason to infer," *see Clarke*, 479 U.S. at 403, from the legislative history, statutory language, and implementing regulations noted above, that Sun Prairie is among the class of plaintiffs with at least some protected interests.

In short, the court of appeals' decision – which begins and ends with the obvious, but incomplete, conclusion that Title 25 benefits Indians – ignores other critical interests protected by the statute. While §§ 81 and 415 promote tribal interests in entering into leases, they also are intended to further economic development by preventing economic dislocation in Indian lands produced by unauthorized tribal or federal actions. *Compare Bennett*, 520 U.S. at 176-77 (finding standing and noting that, in addition to preserving species, another objective of the Endangered Species Act is

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12. Again, this is true under both the pre-and post-revision versions. *Compare* 25 U.S.C. § 81 (West 1998) (requiring a tribe to disclose the scope of tribal authority and reasons for exercising that authority), *with* 25 U.S.C. § 81(d)(2) (2002) (prohibiting approval unless the contract (i) provides remedies for breach of contract and (ii) discloses the tribe's ability to assert sovereign immunity or provides an express waiver of sovereign immunity) (App. 66a and 62a, respectively); *compare also* 25 U.S.C. § 415 (West 1998) (requiring that the Secretary consider the availability of a judicial forum for actions arising on leased lands and environmental effects), *with* 25 U.S.C. § 415 (West 2002) (same) (App. 68a and 64a respectively).

"to avoid the needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives"). If a private investor can claim no right to defend an approved lease that it has entered on tribal land, there can be no doubt that such dislocation will occur, for who could afford to take the risk that their approved lease could simply be voided by BIA at any time, without process and without standing to be heard to defend it?

The court of appeals' decision is in conflict with fundamental standing principles articulated by this Court, a conflict made all the more important here by the deleterious effect the decision will have on federal policy if left uncorrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED APRIL 5, 2002

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 00-2468/2471

Rosebud Sioux Tribe, a federally recognized Indian Tribe,

Plaintiff-Appellant,

Sun Prairie, a Nebraska general partnership,

Plaintiff-Appellee,

v.

James H. McDivitt, Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior[1]; Gail A. Norton, Secretary of the Interior, U.S. Department of the Interior[2],

Defendants,

Concerned Rosebud Area Citizens, a South Dakota non-profit corporation; South Dakota Peace and Justice Center, an

1. James H. McDivitt has been appointed to serve as Acting Assistant Secretary for Indian Affairs, and is substituted as defendant pursuant to Fed. R. App. P. 43(c).

2. Gail A. Norton has been appointed to serve as Secretary of the Interior, and is substituted as defendant pursuant to Fed. R. App. P. 43(c).

unincorporated association; Prairie Hills Audubon Society, a South Dakota non-profit corporation; Humane Farming Association, a California non-profit association,

Intervenors-Defendants-Appellants.

Submitted: February 26, 2001.

Filed: April 5, 2002.

Before WOLLMAN,[3] Chief Judge, HANSEN[4] and BYE, Circuit Judges.

BYE, Circuit Judge.

This case arises from the Rosebud Sioux Tribe's lease of land to Sun Prairie for construction of a pork production facility. Because the lease covers land included within the Rosebud Indian Reservation, the Bureau of Indian Affairs (BIA) had to review and approve the lease. Prior to approval, and because such constitutes federal action, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370d, mandated preparation of an environmental impact statement (EIS) if the project would result in any significant

3. The Honorable Roger L. Wollman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the Honorable David R. Hansen.

4. The Honorable David R. Hansen became Chief Judge of the United States Court of Appeals for the Eighth Circuit on February 1, 2002.

environmental impact. Accordingly, BIA engaged a contractor to prepare an Environmental Assessment (EA), to predict the likely environmental impact. Based on the EA, BIA determined the project would cause no significant impact which would require the preparation of an EIS. Thereafter, BIA issued a Finding of No Significant Impact (FONSI) and approved the lease, which the Tribe and Sun Prairie executed.

Almost five months later, the former Assistant Secretary for Indian Affairs at the Department of Interior, Kevin Gover (Assistant Secretary), voided the lease saying the FONSI was issued in violation of NEPA. Sun Prairie and the Tribe filed suit against Gover and requested a preliminary and permanent injunction. Several environmental and public interest groups (collectively, the Intervenors) intervened as defendants. The district court granted a preliminary injunction and, after a hearing, a permanent injunction. *Rosebud Sioux Tribe v. Gover*, 104 F. Supp. 2d 1194 (D.S.D. 2000). The defendants and the Tribe now appeal. Because we find Sun Prairie lacks standing to pursue its claims, we vacate the district court's order granting a permanent injunction, and remand with instructions to dismiss the complaint for lack of jurisdiction.

I. BACKGROUND

In the spring of 1998, the Tribe and Sun Prairie agreed to negotiate a land lease for the development of a multi-site hog production facility on tribal trust land. The BIA office in South Dakota arranged for the preparation of a project EA which was finalized in August, 1998. Based upon the EA, the BIA Superintendent issued a FONSI and authorized the Tribe to sign the lease. The lease between the Tribe and Sun

Prairie was executed on September 8, 1998, and approved by the Aberdeen Area Director for the BIA on September 16, 1998. Construction on the project began on or about September 21, 1998.

The project consists of two phases. Phase I consists of three finishing sites to be used to fatten hogs for market. Phase II consists of five sow sites and five additional finishing sites. As of the date of the hearing on Sun Prairie's application for a preliminary injunction, the Tribe, to some extent, and Sun Prairie to a great extent, had expended approximately $5,000,000 on construction.

On November 23, 1998, the intervenors in this action sued the federal government in the United States District Court for the District of Columbia, seeking to suspend or enjoin BIA's approval of the lease. *Concerned Rosebud Area Citizens v. Babbitt*, 34 F. Supp. 2d 775 (D.D.C. 1999). On January 27, 1999, Assistant Secretary Gover sent a letter to the Tribe voiding the lease because the FONSI did not fully comply with NEPA. The parties to the D.C. litigation then entered into a joint stipulation of dismissal and the case was dismissed without prejudice.

The Tribe and Sun Prairie initiated the present action challenging the Assistant Secretary's authority and decision to void the lease. The district court issued a temporary restraining order on February 11, 1999, which was later extended. Eventually, the district court granted a permanent injunction restraining defendants from "taking any actions, other than seeking relief by appeal or other appropriate judicial relief, which actions would have the purpose or

consequence of interfering or attempting to interfere with the construction or operation of the project that is the subject of this action." *Rosebud Sioux Tribe*, 104 F. Supp. 2d at 1213-14. The Government and Intervenors have appealed from the permanent injunction.

Subsequent to entry of the permanent injunction, the Tribe held general tribal elections and the composition of the tribal council changed. The reconstituted tribal council no longer favored the hog production project, and determined the Assistant Secretary's decision to void the lease should be upheld. The Tribe requested, and we granted, permission to realign itself as an appellant.

II. DISCUSSION

Sun Prairie claims the Assistant Secretary's decision to void the lease was taken in violation of (1) 25 U.S.C. §§ 1(a), 81 & 415; (2) NEPA, and its enabling regulations, 40 C.F.R. §§ 1500-1508; and (3) the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470-470x-6. The Intervenors contend Sun Prairie lacks standing to assert these claims. Specifically, the Intervenors argue the interests which Sun Prairie seeks to protect do not fall within the zone of interests intended to be protected or regulated by the statutes in question. The Intervenors characterize Sun Prairie's interests as solely economic, while Sun Prairie characterizes its interests as economic and procedural.

"The question of standing 'involves . . . constitutional limitations on federal-court jurisdiction.'" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Warth v. Seldin*, 422 U.S.

490, 498 (1975)). "To satisfy the case or controversy requirement of Article III, which is the irreducible constitutional minimum of standing, a plaintiff must, generally speaking, demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Id.* (internal quotations omitted). The Intervenors concede Sun Prairie has satisfied the constitutionally-mandated elements of standing.

In addition to constitutional requirements, standing also involves prudential limits on the exercise of federal jurisdiction. *Bennett*, 520 U.S. at 162. Prudential limits require a plaintiff to show the grievance arguably falls within the zone of interests protected or regulated by the statutory provision invoked in the suit. *Id.*

Sun Prairie brought its suit under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, which provides for judicial review of federal agency action. *Cent. S.D. Coop. Grazing Dist. v. Sec'y of the U.S. Dep't of Agric.*, 266 F.3d 889, 894 (8th Cir. 2001) (hereafter *Grazing*). The APA is a procedural statute and provides only the "framework for judicial review of agency action." *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996) (citing *Defenders of Wildlife v. Adm'r, EPA*, 882 F.2d 1294, 1303 (8th Cir. 1989)). A suit brought under the APA must be based upon the violation of a separate statute whose violation forms the basis for the complaint. *Preferred Risk Mut. Ins. Co.*, 86 F.3d at 792. Thus, in order to establish standing, a plaintiff seeking judicial review must also show the injury complained

of falls within the zone of interests sought to be protected by the statutory provision. *Bennett*, 520 U.S. at 162-63.

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987).

"Whether a plaintiff's interest is arguably . . . protected . . . by the statute within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-76 (internal quotations omitted). We therefore analyze, in turn, each of the statutory provisions upon which Sun Prairie relies.

A. 25 U.S.C. §§ 1(a), 81 & 415.

Sun Prairie first asserts standing under three statutes involving the relationship between Indian tribes and the federal government. 25 U.S.C. §§ 1(a), 81 & 415. Although Sun Prairie has interests which are threatened by the Assistant Secretary's actions, none fall within the zone of interests sought to be protected by §§ 1(a), 81 and 415. Section 1(a) merely allows the Secretary of the Interior to delegate certain powers and duties to the Commissioner of Indian Affairs to

facilitate the administration of laws governing Indian affairs. 25 U.S.C. § 1(a). Sections 81 and 415 impose limitations on contracts and leases involving Indian lands, and are intended to protect only Native American interests. 25 U.S.C. §§ 81 & 415; *see Schmit v. Int'l Finance Mgmt. Co.*, 980 F.2d 498, 498 (8th Cir. 1992) (holding § 81 was enacted solely for the benefit of Indians); *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1056 (10th Cir. 1993) (holding § 81 protects Indians from improvident and unconscionable contracts); *Webster v. United States*, 823 F. Supp. 1544, 1550 (D. Mont. 1992) (holding § 415(a) insures Native American land transactions with third parties are advantageous), *aff'd*, 22 F.3d 221 (9th Cir. 1994); *cf. San Xavier Dev. Auth. v. Charles*, 237 F.3d 1149, 1152-53 (9th Cir. 2001) (holding § 416[5] confers no standing to non-tribal or non-government litigants).

In support of its standing argument, Sun Prairie cites *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir. 1983). Sun Prairie contends *Yavapai-Prescott* recognized the right of a non-Indian lessee of Indian land to assert claims under § 415. But, *Yavapai-Prescott* does not support Sun Prairie's claim of standing under Title 25 of the United States Code. The case involved a tribe's attempt to terminate unilaterally a lease which had previously been approved by the Secretary of the Interior in accordance with § 415. *Id.* at 1074. The Ninth Circuit refused to recognize the right of the tribe to terminate a previously approved lease without the Secretary's consent. *Id.* at 1075. Though the non-Indian

5. Section 416 authorizes leases of land located within the San Xavier Indian Reservation. Section 415 authorizes leases of land located within the Rosebud Sioux Indian Reservation, among others.

lessee was a party to the case, the court never addressed *his* claims or considered whether *he* had standing to assert those claims under § 415. *Id.* at 1074 n.4 (declining to reach and consider lessee's previously dismissed counterclaims, because the tribe had no authority to terminate the lease unilaterally).

It is apparent Sun Prairie garners no support for its position from the precedent of our sister circuit. In *San Xavier*, the Ninth Circuit expressly rejected a non-tribal litigant's claim of standing: "As a lessee, and not an allottee landowner, the Development Authority's interest is not 'arguably within the zone of interests to be protected or regulated by the statute . . . in question.'" 237 F.3d at 1153 (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). "A non-Indian party to a contract does not have the right to employ statutory remedies enacted to protect Indian tribes and their members." *Id.* (citing *Chuska Energy Co. v. Mobil Exploration & Producing N. Am., Inc.*, 854 F.2d 727, 732 (5th Cir. 1988) (holding a lessee's interest is not arguably within the zone of interests to be protected or regulated by 25 U.S.C. § 416)).

Because the statutes relied upon by Sun Prairie were enacted to protect Indian interests, we believe it would be inconsistent to interpret them as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribes' interests. Sun Prairie's asserted interests, while considerable, are not arguably within the zone of interests to be protected or regulated by the Indian statutes. Therefore, Sun Prairie has no standing to proceed under Title 25 of the United States Code.

B. NEPA

Sun Prairie next asserts standing under NEPA. The Intervenors argue Sun Prairie lacks standing under NEPA because the interests it seeks to protect are solely economic. We agree.

NEPA establishes a "broad national commitment to protecting and promoting environmental quality." *Grazing*, 266 F.3d at 895 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)). "The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993). Organizations with genuine environmental interests are proper parties to represent the public's environmental interests and challenge agency action. *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976). Parties motivated in part by protection of their own economic interests may also challenge agency action as long as their environmental interests are not so insignificant that they should be disregarded altogether. *Robinson v. Knebel*, 550 F.2d 422, 425 (8th Cir. 1977). But parties motivated solely by "their own economic self-interest and welfare, are singularly inappropriate parties to be entrusted with the responsibility of asserting the public's environmental interest. . . ." *Churchill*, 533 F.2d at 416.

The overriding purpose of NEPA is to prevent or eliminate damage to the environment. But even purely economic interests may confer standing under NEPA if the particular NEPA provision giving rise to the plaintiff's suit

evinces a concern for economic considerations. *See Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125-26 (8th Cir. 1999) (citing provisions of NEPA requiring consideration of social and economic effects of agency action); *Grazing*, 266 F.3d at 895-96 (same). NEPA standing jurisprudence "requires us to closely scrutinize the asserted basis for standing." *Grazing*, 266 F.3d at 895. We must determine whether the asserted interest "is arguably protected by [NEPA] under the zone-of-interests test . . . *by reference to the particular provision of law upon which the plaintiff relies, and not by reference to the overall purpose of the act in question.*" *Id.* at 896 (citing *Bennett*, 520 U.S. at 175-76) (emphasis supplied).

Sun Prairie fails to cite in its complaint or other filings any particular provision of NEPA upon which it relies to protect its economic interests. Instead, it refers broadly to NEPA, relying on *Dombeck* and *Robinson* to argue that plaintiffs motivated by economic interests have standing under NEPA. 164 F.3d at 1127; 550 F.2d at 425. *Dombeck* and *Robinson* are, however, inapposite. In *Dombeck*, the plaintiffs relied upon particular provisions of NEPA which required the agency to take economic interests into consideration when preparing an EIS. 164 F.3d at 1125-26. In this case, no EIS was ever prepared. Thus, the provisions requiring an EIS to consider economic impact are not in play. Sun Prairie's reliance upon *Robinson* is equally misplaced. The *Robinson* plaintiffs, in addition to citing economic interests, claimed that agency action would impede their use of the affected land for hunting and fishing. 550 F.2d at 425. Though motivated in part by economic interests, their environmental concerns were sufficient to establish standing. *Id.*

We believe the outcome in this case is controlled by our very recent holding in *Grazing*, in which a corporation composed of individual ranchers sought review under NEPA of an agency decision reducing the number of acres available for grazing in the Fort Pierre National Grasslands. 266 F.3d at 892. The plaintiff claimed solely an economic injury, and asserted standing based upon the following NEPA provisions: 42 U.S.C. §§ 4332(2)(C), 4331(a) and 4332(2)(E). We rejected the plaintiff's standing argument. We held that although § 4332(2)(C) requires consideration of economic interests, the provision only applies when an EIS is prepared. In that case, because a FONSI was issued, no EIS was prepared. We also rejected the plaintiff's claim of standing based upon § 4332(2)(E). "Section 4332(2)(E) [requires] federal agencies to consider environmentally sound alternatives to proposed actions without reference to the human environment and, thus, to economic interests." *Id.* at 896. Finally, we held § 4331(a) was merely a broad policy statement, and did not provide a basis for plaintiff's standing. "Regardless of that overall broad policy, we must look to the specific provision under which the Grazing District raised its NEPA claim." *Id.* (citing *Bennett*, 520 U.S. at 175). Like *Grazing*, this case involves the preparation of an EA and issuance of a FONSI. No EIS was prepared. Consequently, Sun Prairie's economic interests were never considered and do not fall within NEPA's zone of interests.

Our efforts to determine whether Sun Prairie has standing to assert its NEPA claim are hampered by its failure to reference the particular provisions of NEPA upon which it relies. Our review of NEPA has failed to uncover any provisions, aside from those governing preparation of an EIS,

which would support a claim motivated by purely economic interests. Further, Sun Prairie has not asserted any environmental interest which would otherwise bring its claim within NEPA's zone of interests. Therefore, Sun Prairie does not have standing to bring its claim under NEPA.

C. NHPA

Sun Prairie also claims standing under NHPA. NHPA was enacted to "encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment." 16 U.S.C. § 470- 1(5). Congress believed "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." 16 U.S.C. § 470(b)(2). Sun Prairie makes no attempt to demonstrate how its economic interests fall within the zone of interests protected or regulated by NHPA. Nor does Sun Prairie even attempt to show how the agency action implicates NHPA. Indeed, the record reflects the Assistant Secretary's decision to void the lease was based upon a failure to comply with the mandates of NEPA, not NHPA. Because we are unable to divine any basis for standing under NHPA, Sun Prairie's NHPA claim is rejected.

D. Procedural Interest/Injury.

In addition to economic loss, Sun Prairie argues it sustained injury to its procedural interest because the Assistant Secretary did not follow correct procedures when he reconsidered the earlier agency decision and voided the lease. Sun Prairie contends its procedural injury satisfies the

requirements of prudential standing because its procedural interest falls within the zone of interests sought to be protected by Title 25 of the United States Code, NEPA and NHPA.

Injury to a procedural interest may satisfy the constitutional requirements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 553, 571-73 n.7 (1992). "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* We assume, without deciding, that Sun Prairie has established procedural standing. Procedural standing, however, only affects the showing a plaintiff must make to establish the elements of constitutional standing. *Id.* While procedural standing can substitute for constitutional standing, it does nothing to satisfy prudential standing. Thus, Sun Prairie must still show that its concrete interests, which underlie the procedural right, fall within the zone of interests the statutes are designed to protect. *Douglas County v. Babbitt*, 48 F.3d 1495, 1500 (9th Cir. 1995). As we have already determined above, Sun Prairie's economic interests, while considerable, do not fall within the zone of interests intended to be protected by the statutes upon which it relies. Accordingly, its allegation of procedural injury does not provide the necessary basis to establish prudential standing.

Appendix A

III. CONCLUSION

The order of the district court granting a permanent injunction is vacated. The case is remanded to the district court with instructions to dismiss the complaint for lack of jurisdiction.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B — ORDER GRANTING PERMANENT INJUNCTIVE RELIEF OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION DATED FEBRUARY 1, 2000 AND FILED FEBRUARY 3, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CIV. 99-3003
2000 D.S.D. 12

ROSEBUD SIOUX TRIBE, a federally recognized Indian Tribe; and SUN PRAIRIE, a Nebraska general partnership,

Plaintiffs,

v.

KEVIN GOVER, Assistant Secretary, Indian Affairs, U.S. Dept. of Interior; and BRUCE BABBITT, Secretary of the U.S. Dept. of Interior,

Defendants,

CONCERNED ROSEBUD AREA CITIZENS, SOUTH DAKOTA PEACE and JUSTICE CENTER, PRAIRIE HILLS AUDUBON SOCIETY, and HUMANE FARMING ASSOCIATION,

Intervenors.

Appendix B

ORDER GRANTING PERMANENT INJUNCTIVE RELIEF

KORNMANN, U.S. DISTRICT JUDGE

On March 3, 1999, the Court entered an order granting a preliminary injunction in this matter, Doc. 53. The parties were permitted to file simultaneous supplemental briefs on issues related to permanent injunctive relief. On April 12, 1999, plaintiffs filed a supplemental brief, Doc. 65. Defendants and intervenors filed motions for summary judgment, Docs. 68 and 73, which the Court deemed to be procedurally improper and denied as moot, Doc. 109. The Court also denied defendants' and intervenors' requests to supplement the administrative record.[1] On April 21, 1999, Defendants and intervenors filed supplemental briefs, Docs. 79 and 81. The findings of fact from the Court's order granting a preliminary injunction are restated below.

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1. "Any attempt to introduce or rely on new evidence or materials other than published case law is also inappropriate. Not only did counsel for defendants and intervenors fail to indicate a need to supplement the administrative record at the close of the hearing on February 18, 1999, but they also made affirmative representations to the Court that they would rely on the administrative record evidence submitted prior to and during that hearing. They do not now offer any convincing justification to support their change of position nor any persuasive arguments to allow the supplementary documents to become part of the record. Allowing the introduction of or reliance on any supplementary documents in the briefs addressing permanent injunctive relief would deprive plaintiffs of their right to rebut or object to such documents." (Doc. 109 at 2).

Appendix B

BACKGROUND

In the spring of 1998, the Rosebud Sioux Tribe (the "Tribe") and Sun Prairie agreed to negotiate a land lease (the "lease") for the development of a multi-site hog production facility (the "project") on tribal trust land in Mellette County, South Dakota. A public informational meeting regarding the project was held in Norris, South Dakota, on June 15, 1998. The BIA office in South Dakota contracted with RESPEC of Rapid City, South Dakota, to prepare a draft Environmental Assessment ("EA") for the project which draft EA was released in late June of 1998. The comment period expired on July 29, 1998. Based on the final EA that was released on Friday, August 14, 1998, BIA Rosebud Agency Superintendent Larry Burr issued a Finding of No Significant Impact ("FONSI") that same day and notice of the FONSI was published in local newspapers of general circulation the following week.

On August 19, 1998, the Rosebud Sioux Tribal Council adopted Tribal Resolution #98-203 which authorized the execution of the lease for the project. The lease between the Tribe and Sun Prairie was executed on September 8, 1998. On September 16, 1998, Cora Jones, Aberdeen Area Director for the BIA, approved the lease pursuant to 25 U.S.C. §§ 81 and 415 and 25 C.F.R. § 162.5 (1998). The lease was recorded with the BIA Aberdeen Area Land Title and Records Office on September 17, 1998. On or about September 21, 1998, the Tribe and Sun Prairie commenced construction on so-called site 1 of phase I of the project. The project consists of two phases. Phase I consists of three finishing sites to be used to fatten hogs for market. Phase II consists of five sow

sites and five additional finishing sites. As of the date of the hearing on plaintiffs' application for a preliminary injunction, the Tribe, to some extent, and Sun Prairie to a great extent, had expended approximately $5,000,000 on construction for site 1, which was substantially complete.

Letters from various parties concerned about the project were sent to Area Director Jones, Assistant Secretary Gover (the "Assistant Secretary"), and others during the month of September of 1998, but no administrative appeal of the lease approval was ever served or filed. No letter of protest even referred to the lease. Comments from the Environmental Protection Agency ("EPA") on the draft EA were not received until September 1, 1998, even though a copy of the draft EA was received by EPA during the first or second week of July. The EPA had an opportunity to timely respond but failed to do so. Additional EPA comments on the project were received on October 15, 1998, after the lease had already been approved. Local BIA officials met with EPA staff on at least four different occasions between September of 1998 and January of 1999 to address the concerns EPA had with the project.

On November 23, 1998, intervenors in this present action sued the federal government in the United States District Court for the District of Columbia, seeking to suspend or enjoin the effectiveness of the BIA's approval of the lease and alleging violations of the National Environmental Protection Act ("NEPA") and the National Historic Preservation Act ("NHPA"). *Concerned Rosebud Area Citizens v. Babbitt*, No. 98-2841 (D.D.C.) (hereinafter "D.C. litigation"). The government moved to transfer venue to the

District of South Dakota, arguing that the Tribe and Sun Prairie were indispensable parties,[2] and submitted affidavits of then Rosebud Sioux Tribal President Norman G. Wilson and Rich Bell, general partner of Sun Prairie, that set forth the interests of the Tribe and Sun Prairie in participating in the litigation. The court in the District of Columbia denied the government's motion to transfer. The administrative record related to the project EA and FONSI was received by the Department of Justice on January 25 and 26, 1999. On January 27, 1999—one day after the government filed an answer (drafted by present counsel for defendants in this action in the District of South Dakota) in the D.C. litigation denying any violations of NEPA or NHPA in connection with the project—Assistant Secretary Gover sent a letter to the Tribe stating that the BIA's approval of the lease for the project was void for failing to fully comply with NEPA. The parties to the D.C. litigation then entered into a joint stipulation of dismissal on January 28, 1999, which cited the Assistant Secretary's letter voiding the lease approval, and the court dismissed that case without prejudice.

The Tribe and Sun Prairie initiated the instant action, challenging the Assistant Secretary's authority and decision to void the lease and seeking a declaration that the EA prepared for the project complied with NEPA. A telephonic hearing on plaintiffs' motion for a temporary restraining order, Doc. 3, was held on February 9, 1999. The Court orally granted the motion during the telephonic hearing and issued a written temporary restraining order, Doc. 16, on February 11, 1999. The Court, pursuant to Fed. R. Civ. P. 65(a)(2),

2. Intervenors challenge this assertion by defendants. (Intervenors' supp. br. at 9 n.8.)

ordered the consolidation of the hearing on the application for a preliminary injunction with the trial on the merits.[3]

3. Intervenors contend in their supplemental brief that although the court had authority to conduct an evidentiary hearing on the plaintiffs' request for a preliminary injunction, the Court improperly invoked Rule 65(a)(2) because cases involving challenges to agency decisions are limited to the administrative record and do not require a "trial" on the merits. (intervenors' supp. br. at 12 n.10.) First, on February 8 and 9, 1999, the Court informed the parties of its intent to consolidate the hearing on the application for a preliminary injunction with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). During the hearing, which commenced on February 17, 1999, the Court reiterated that the hearing was to be consolidated so as to ensure that all parties understood the procedure, and no party objected. At the conclusion of the hearing on February 18, 1999, counsel for all parties represented to the Court that all of the relevant evidence had been introduced and was part of the record upon which the Court could issue a ruling on the plaintiffs' request for permanent injunctive relief. (Tr. Prelim. Inj. Hr'g at 367-69.) Intervenors' objection at this stage is untimely in light of the adequate notice given as to consolidation and earlier opportunities to object. Second, intervenors cite no authority to support their objection and appear to adopt a reading of Rule 65(a)(2) that ignores its purpose: "[T]o consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases. * * * [R]epetition can be avoided with an increase of efficiency in the conduct of the case and without any distortion of the presentation of evidence by the parties." Fed. R. Civ. P. 65, Advisory Committee Notes, 1966 Amendments; *see also Birmingham Realty Co. v. General Services Admin.*, 497 F. Supp. 1377 (N.D. Ala. 1980) (involving a challenge to GSA's award of a lease as arbitrary and capricious in which the district court consolidated the preliminary hearing with the trial on the merits of the case pursuant to Fed. R. Civ. P. 65(a)(2)). The rule was invoked

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A hearing was held on February 17-18, 1999. Prior to the hearing, the Court granted a motion to intervene, Doc. 21. At the conclusion of the hearing, the Court orally extended the temporary restraining order for ten days, pursuant to Fed. R. Civ. P. 65(b). The Court also issued a second temporary restraining order, Doc. 47, on February 18, 1999, *nunc pro tunc* February 26, 1999, prior to granting the preliminary injunction on March 3, 1999.

DECISION

I. Standing

In an attempt to expediently and effectively address the initial matters posed by this litigation, the Court granted intervenors' motion to intervene, Doc. 21, to ensure that all parties with an interest in this matter were adequately represented. In deciding to allow intervention, the Court gave great weight to the fact that, in the D.C. litigation, intervenors were plaintiffs. The Court now will briefly analyze the question of intervenors' standing in this litigation even though the parties did not choose to address this issue and were not asked to address this issue in their simultaneous briefs.

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in the instant case to ensure that all interested parties were represented, that all relevant documents were made part of the administrative record, and that relevant testimony as to all administrative actions was received. In short, the rule was invoked to not only ensure due process, but to pursue the most efficient manner of resolving all of the issues involved in this matter, especially given the procedural deficiencies that preceded the proceedings in this Court.

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An association may sue on behalf of its members if it demonstrates that (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) the claims asserted and relief requested do not require the participation of individual members in the lawsuit. *See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553, 116 S. Ct. 1529, 1534, 134 L. Ed. 2d 758 (1996). In this case, intervenors are citizens' groups who, as mentioned, were plaintiffs in a related lawsuit in the United States District Court for the District of Columbia.

As to the first element, to meet *Article III*'s "case or controversy" requirement, it is the burden of each intervenor to prove: (1) injury in fact, (2) causation, and (3) redressability. *See, e.g., Campbell v. Minneapolis Public Housing Authority*, 168 F.3d 1069, 1073 (8th Cir. 1999) *citing Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1016-17, 140 L. Ed. 2d 210 (1998). Additionally, the Court must consider the prudential requirements for standing, including a requirement that intervenors' claims fall within the "zone of interests" protected by the relevant statutory or constitutional provision. *See, e.g., Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125 (8th Cir. 1999). Intervenors allege that the "injury in fact" is the potential nullification of the order approving the joint stipulation for dismissal filed in the D.C. litigation (Intervenors' mem. supp. mot. intervene, Doc. 18, Attach. A). The stipulation was premised on the Assistant Secretary's letter purporting to void the lease between the Tribe and Sun Prairie and purporting to prevent further construction of the

project until an environmental impact study was completed. The second and third requirements of constitutional standing are easily satisfied: the initiation of this litigation by plaintiffs challenges the validity of the Assistant Secretary's decision to void the lease and a decision by this Court in favor of defendants would retain the power and effect of the Assistant Secretary's action and prevent plaintiffs from going forward with the project.

The second element of associational standing—namely that the interests sought to be protected are germane to the organization's purpose—is related to the "zone of interests" analysis. Intervenors allege an interest in the protection and preservation of the environment and of cultural resources, which interests are undoubtedly within the "zone of interests" protected by NEPA and NHPA. In addition, the Eighth Circuit has recently held that because environmental reviews under NEPA require consideration of social and economic effects, *see, e.g.*, 42 U.S.C. §§ 4331(a), (b)(2), and (b)(5); 40 C.F.R. §§ 1508.27(a) and 1508.8, the "zone of interests" encompasses concerns regarding economic and social consequences. *Friends of Boundary Waters*, 164 F.3d at 1125-27. Again, as the issue of standing was not briefed by the parties, the Court must speculate to a certain degree as to which interests each intervening organization may claim to assert. However, under the requirements set forth above, the Court finds that the interests intervenors seek to protect are germane to their respective purposes and that their claims arguably fall within the zone of interests protected by NEPA and NHPA.

Finally, it does not appear that anything in this lawsuit requires participation by individual members of the intervenor organizations and the third element of associational standing is thus satisfied. The Court finds that intervenors have standing to challenge the sufficiency of the EA as a basis for the FONSI.

II. The Assistant Secretary's Authority to Void the Lease

Plaintiffs contend that the Assistant Secretary lacked any statutory or regulatory authority to unilaterally void the lease. They rely primarily on the absence of any administrative appeal and the failure of defendants to offer any testimony or evidence during the preliminary injunction hearing to explain the Assistant Secretary's action. Plaintiffs further argue that defendants and intervenors fail to demonstrate that 43 C.F.R. § 4.5, which allows the Secretary and Director to assume jurisdiction over a matter or to review decisions made by lower ranking officials, confers such "reserved powers" upon an Assistant Secretary and, even if such power could be exercised, the Assistant Secretary did not follow the appropriate procedures—i.e. providing written notice to the parties and to appropriate agency personnel, requesting and reviewing the administrative record, and providing a written decision. See 43 C.F.R. § 4.5(c). Defendants respond that "[a]n administrative agency has the inherent power to reconsider its decision, regardless of whether the applicable statute and agency regulations expressly provide for such review" and that such power is not vested exclusively in the Secretary (Defs.' supp. br. at 6-7). They cite various cases in which such authority has been exercised to cure prior erroneous determinations or to cancel leases that fail to

comply with applicable law. Defendants claim that much of the case law suggests that an agency's inherent authority often involves *sua sponte* reconsideration, but fail to cite a single case in this regard.[4] Intervenors only briefly address this issue in their supplemental brief opposing permanent injunctive relief,[5] relying on BIA NEPA Handbook 4.4D which states that "[c]ontroversial EAs may be reviewed by the Central Office." (AR 3:0443). Although no procedures or requirements for such review are included in this provision, the legitimacy of the review process is similarly dependent on basic and inherent due process principles.

As previously discussed in the order granting a preliminary injunction, no proper administrative appeal of the Area Director's decision to approve the lease was ever filed. Assuming arguendo that any of the letters filed in opposition to the project satisfied the notice, service and filing requirements set forth in 25 C.F.R. §§ 2.9-2.14, the Assistant Secretary did not take any action with respect to

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4. Defendants also make the rather specious argument that "reconsideration was not initiated *sua sponte* by the Assistant Secretary; rather, it was the direct result of substantive questions regarding the validity of the lease and its underlying NEPA documents being raised by members of the public, Tribal members, citizen groups and other government agencies." (Defs.' supp. br. at 11). If reconsideration were so easily triggered, the inherent authority to reconsider would be virtually unlimited and there would be no reason for the regulations governing formal administrative appeals or petitions for reconsideration.

5. Intervenors earlier argued that the Assistant Secretary's decision was "squarely within his authority" but failed to cite any authority to support this contention (Doc. 29 at 6).

these "appeals" according to the procedures outlined in 25 C.F.R. § 2.20, such as directing a reconsideration. The authority for the Assistant Secretary's decision may derive from the "reserved powers" provision of 43 C.F.R. § 4.5(c), but the parties disagree as to whether or not this provision may be invoked by the Assistant Secretary as it makes reference only to the "Secretary or Director." Assuming that, under the general principles of the delegation doctrine, the Assistant Secretary did have authority to assume jurisdiction over the matter or to review the decisions of the local BIA officials, but would have been bound to follow the requirements of the regulation in exercising any inherent authority, he clearly did not adhere to the procedures outlined in § 4.5(c). Defendants argue that, assuming the requirements of § 4.5(c) apply to the Assistant Secretary, "[t]he parties and appropriate agency personnel were provided actual notice that the lease approved was the subject of a legal challenge and, in the context of that litigation, was being reviewed by the Assistant Secretary, the administrative record was requested, a review was conducted, and a written decision was issued. The plain language of the regulation does not require that the written decision include an analysis of the decision, findings of fact or conclusions of law." (Defs.' supp. br. at 18.) However, as previously addressed in the order granting preliminary injunctive relief, this argument strains any reasonable interpretation of the regulation and is contrary to its purpose—to guarantee due process to any interested party or agency official and to provide a basis on which the reconsideration decision can be reviewed.

In support of the position that the Assistant Secretary had authority to void the lease, defendants focus their

argument on an agency's inherent authority to reconsider its decisions. The Court acknowledges that administrative agencies generally have inherent authority to reconsider their decisions, despite the apparent lack of Eighth Circuit precedent on the issue. Such authority is not, however, unlimited and it is assumed that an agency will adhere to basic principles of due process in undertaking a reconsideration. *See, e.g., Belville Mining Co. v. United States*, 999 F.2d 989, 997-98 (6th Cir. 1993) (holding that "where there is no express reconsideration authority for an agency . . . the general rule is that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision . . . [and] subject to certain [other] limitations."). The Court is not persuaded by the case law cited by defendants in support of their argument that the Assistant Secretary acted within the scope of his inherent authority. As with both *Sangre de Cristo Dev. Co. v. United States*, 932 F.2d 891 (10th Cir. 1991), and *Gray v. Johnson*, 395 F.2d 533, 537 (10th Cir.), *cert. denied*, 392 U.S. 906, 88 S. Ct. 2056, 20 L. Ed. 2d 1364 (1968), which holdings were addressed in the preliminary injunction order, the cases cited by defendants are readily distinguished based on the procedural stance of the parties. These cases involve either decisions made within the context of administrative appeal proceedings or other recognized procedures, such as a petition for reconsideration, that extend proper notice and fair hearings prior to the termination, rescission, or voiding of leases or contracts.

In this case, the Assistant Secretary "deviated from firmly established procedures." *Woods Petroleum Corp. v.*

Department of Interior, 47 F.3d 1032 (10th Cir. 1995). Defendants contend, without citing any authority, that because alleged NEPA violations are resolved by reviewing the administrative record, due process does not require that the parties to the lease be given an opportunity to be heard. This rationale is simply unpersuasive. To his credit, the Assistant Secretary attempted unsuccessfully to facilitate plaintiffs' participation in the D.C. litigation and in the events preceding his decision to void the lease. Nothing in the record, however, suggests that the Assistant Secretary was prohibited in any way from acting within the existing regulations to either assume jurisdiction over the matter or to explicitly exercise the authority to reconsider the challenged decision independent of the pending litigation. It sets an extremely dangerous precedent to act outside the bounds of established procedures and to internally reconsider an agency action within the context of litigation as the parties to the lease, who had already spent more than $5,000,000 in reliance on government action and approvals, "watch from the sidelines."

Beyond any concerns related to the lack of due process, applying the reasoning of the Sixth Circuit in *Belville*—a case cited by defendants—when applied to the particular facts of the present case, also serves to support a finding that the Assistant Secretary did not have authority to reconsider the final decision of BIA Area Director Jones to approve the lease between the Tribe and Sun Prairie. The Court quoted *McAllister v. United States*, 3 Cl. Ct. 394, 398 (1983), as follows:

> Barring a showing of error, an agency may reconsider its final decision only if the reconsideration is timely and the parties have not adversely changed their

> positions in reliance on that decision . . . *If the parties act on the initial decision, however, and if the agency knows they will act, then the agency may reverse its initial decision only upon a showing that it was erroneous.*

999 F.2d at 999 (emphasis added); *see also Confederated Tribes of the Warm Springs Reservation of Oregon v. United States*, 177 Ct. Cl. 184, 1966 WL 8893 (1966) (stating that it was "especially dangerous" for an agency to reconsider an earlier decision when there had been "reliance on the assumed finality of the decision," but holding that because "the initial determination had not passed beyond [the Commission's] control," there could be no presumption of finality). In other words, because the Tribe and Sun Prairie did act on the Area Director's approval of the lease and the agency knew that construction on the Project would begin immediately if no appeals were filed, the Assistant Secretary's decision to void the lease is valid only if the EA was found to be insufficient.

As previously discussed, no administrative appeals were filed within the 30 days prescribed by 25 C.F.R. § 2.9(a); thus, the Area Director's approval of the lease became the agency's "final decision." *See* 25 C.F.R. § 2.6(b). There is no dispute that the Tribe and Sun Prairie acted on this final decision and began construction on the project at the end of September. Therefore, the second portion of the *McAllister* decision quoted above is triggered and a showing that the initial decision was erroneous is required. However, even if we assume that the parties had not adversely changed their positions in reliance on the lease approval and there was no suggestion or showing that the lease approval was erroneous,

the Assistant Secretary could only have reconsidered the "final decision" if the reconsideration was timely. The relevant factors cited in *Belville* to determine whether or not an agency reconsideration decision was timely include the following: (1) the complexity of the decision; (2) whether the decision was factually or legally based; (3) whether the agency acted according to its general procedures for review; (4) whether the express time limit for appeals set forth in the regulations had run; (5) whether legally cognizable property interests had arisen through the initial decision; (6) whether the plaintiff had acted in reliance on the initial decision; (7) whether the agency had attempted to use a pretext to justify reconsideration; and (8) the probable impact of an erroneous agency decision absent reconsideration. 999 F.2d at 1001. Applying these factors to the particular facts of this case set forth above, the Court finds that the nearly five-month delay between the decision to approve the lease and the Assistant Secretary's letter declaring the lease void renders the Assistant Secretary's reconsideration untimely and thus invalid.

The Assistant Secretary's letter indicates that NEPA requirements were likely not met but the letter is conclusory and offers absolutely no legal analysis or factual explanation as to the inadequacy of the EA. It fails to provide any rational showing that approval of the lease and issuing the FONSI were erroneous. This is precisely plaintiffs' complaint—that the Assistant Secretary failed to offer specific reasons as to how the EA was insufficient under NEPA. Therefore, under the *Belville* holding, the inquiry as to the Assistant Secretary's authority to reconsider and reverse the decisions to issue the FONSI and approve the lease is thus inextricably linked to

the Court's ultimate determination as to whether or not the EA is sufficient under NEPA. For reasons set forth in Section V, the Court finds that the EA is sufficient, the decision not to prepare the Environmental Impact Statement (EIS) was not arbitrary and capricious, and thus, the Assistant Secretary had no authority to reconsider the FONSI and to void the lease.

III. The Validity of Assistant Secretary Gover's Decision to Void the Lease

Assuming arguendo that the Assistant Secretary had the authority to void the lease between the Tribe and Sun Prairie, his action would constitute a "final decision" for the agency, subject to judicial review. 25 C.F.R. § 2.6(c). The question is whether he properly exercised any such authority. The standard of review to be applied is whether his decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Plaintiffs state that an agency has a duty to examine relevant data and articulate a satisfactory explanation for exercising its discretion, including "a rational connection between facts found and choice made." *Motor Vehicles Mftrs. Ass'n v. State Farm Mut. Life Ins. Co.*, 463 U.S. 29, 43, 48 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)), *cert. denied*, 480 U.S. 951 (1987). They argue that it is undisputed that the Assistant Secretary did not review the administrative record prior to his decision to void the lease and that he did not provide any explanation for the incongruity between his decision and defendants' Answer in the D.C. litigation which Answer denied the allegations of any violation of NEPA or NHPA. *See Seldovia Native Ass'n*

v. Lujan, 904 F.2d 1335, 1346 (9th Cir. 1990) (holding that an agency can change its view but only "so long as the agency acknowledges and explains the departure from its views"). Plaintiffs also contend that defendants' failure to call witnesses or to present evidence at the preliminary injunction hearing implies that no legally valid explanation for the Assistant Secretary's decision exists. *See, e.g., Kostelec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220, 1229 (8th Cir. 1998). Defendants contend that the validity of the Assistant Secretary's decision does not turn on what he actually reviewed or knew at the time the decision was made, but rather whether or not the record before the agency supports his decision. *See, e.g.*, 5 U.S.C. § 706(2)(A); *Haynes v. United States*, 891 F.2d 235, 238 (9th Cir. 1989). They also attempt to explain away the significance of the Answer filed in the D.C. litigation which Answer denied any violations of NEPA and NHPA. (Defs.' supp. br. at 13). Intervenors argue that the Court must uphold the Assistant Secretary's decision to void the lease, despite its lack of clarity, "if the agency's path may reasonably be discerned" from the record that was before the agency. *MVMA*, 463 U.S. at 43; *see also California Dep't of Health Servs. v. Babbitt*, 46 F. Supp. 2d 13 (D.D.C. 1999).

As stated in the Order granting a preliminary injunction, the Assistant Secretary's letter to the Tribe, dated January 27, 1999, in which he declares the lease void, offers no findings of fact or conclusions of law to support his decision. A reviewing court is thus left with no basis at all on which to review the factors underlying his decision. The Court remains unpersuaded by defendants' argument that what the Assistant Secretary and his staff may have reviewed or not reviewed is immaterial. This position is entirely inconsistent with the standard of

review—whether the decision maker considered all the relevant factors before reversing decisions made by local or other agency personnel. The administrative record is voluminous. Most of the documents comprising the administrative record were not received by the Assistant Secretary's office until January 25-26, 1999, only one or two days prior to the decision to void the lease.[6] Thus, it is impossible that the Assistant Secretary or even his staff could have adequately reviewed the record in order to meet any standard of review. Moreover, defendants' reliance on EPA's concerns with the project is further evidence that the Assistant Secretary's decision was arbitrary and capricious. EPA indicated at the outset that it was only going to assume a limited role in overseeing the project (Tr. at 218-19). The EPA September and October letters were sent to BIA officials after the comment period on the draft EA had expired on July 29, 1998, and the content of the letters indicated a lack of familiarity with certain details of the project as well as with mitigation measures (Tr. 272, 330, 342-43). Nonetheless, Superintendent Burr convened two meetings with the EPA and representatives of the Tribe, Sun Prairie, and the South Dakota Department of Environment and Natural Resources (a state agency having no jurisdiction at all in Indian Country) to address the concerns (Tr. at 222)[7].

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6. Defendants' attempt to supplement the administrative record, Doc. 72, is further proof that the Assistant Secretary did not have the entire administrative record available to him prior to his decision to void the lease and that he could not have considered all possibly relevant factors.

7. Superintendent Burr testified that there was consensus among those at the meeting that the project was environmentally sound, the lease approval was valid, and that construction could commence. (Tr. at 224.) Plaintiffs point out that defendants did not introduce any evidence to contradict this testimony.

Moreover, the testimony of Ms. Campbell at the preliminary injunction hearing was unconvincing in explaining EPA's concerns with the project and in justifying the actions that the agency pursued prior to the Assistant Secretary's decision to void the lease.[8]

Nor is the Court persuaded by defendants' argument regarding the relevance of their Answer in the D.C. litigation (Defs.' supp. br. at 13). As explained in the order granting a preliminary injunction, defendants' answer was filed pursuant to the requirements of Fed. R. Civ. P. 11(b). They certified that their legal position was "formed after an inquiry reasonable under the circumstances," that their "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery," and that their denials of "factual contentions" being made by the D.C. plaintiffs "are warranted on the evidence." Taking into account all of the foregoing, including the Assistant Secretary's failure to provide any specific reasons for his decision to void the lease, his decision not to testify at the hearing before this Court or to offer any other satisfactory evidence explaining his action, as well as the fact that he or his staff could not possibly have made any

8. Citing Ms. Campbell's testimony, plaintiffs state that EPA initiated meetings with CEQ, BIA headquarters in Washington, D.C., and the Department of Justice without advising plaintiffs or affording them an opportunity to participate in the meetings (Tr. at 318, 325, 328). These meetings did not result in referring the matter to the Council on Environmental Quality ("CEQ") for resolution of interagency NEPA disputes, pursuant to federal regulations. *See* 40 C.F.R. §§ 1504.1-1504.3. These events raise additional questions as to the total lack of due process afforded plaintiffs.

adequate (or even cursory) review of the administrative record prior to his decision, the Court finds that the Assistant Secretary's decision to void the lease was arbitrary, capricious, an abuse of discretion, and was otherwise not in accordance with law.[9]

An important policy consideration must also be addressed in determining the validity of the Assistant Secretary's decision to void the lease—the balance between finality of decisions and compliance with NEPA. A significant factor that must be weighed under the particular facts of this case is the tribal trust relationship and the need for economic development on Native American reservations. If the Assistant Secretary's decision is upheld and permanent injunctive relief in favor of plaintiffs is denied, "the logical conclusion [would be] that bureaucratic misconduct will prejudice these plaintiffs and will also prejudice other entities who might be considering contracts with Native American Tribes for the beneficial use of tribal trust land. Indeed, the failure of this project based on administrative ineptitude and procedural unfairness would absolutely deter private entities and lending institutions from pursuing economic relationships with the various tribes. Such circumstances are

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9. Defendants argue that if the Assistant Secretary's decision to void the lease is determined to be arbitrary and capricious, the Court should remand the matter to the agency for additional investigation. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). However, like the Tenth Circuit in *Woods Petroleum*, this Court concludes that remand for further investigation or explanation would be fruitless, especially in light of the Court's finding *infra* that the EA is sufficient and that the Area Directors's approval of the lease should be upheld.

in direct contravention with (sic) the unique duty of the federal government toward Native American tribes and would block the economic self-determination of the tribes." (Doc. 53 at 13). The federal government has a "distinctive obligation of trust" with regard to Indian tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). Indian tribes and their members occupy "a unique legal status." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

IV. Equitable Doctrines Applicable to the Assistant Secretary's Decision

It is well settled that the government may not be estopped on the same terms as other litigants. *United States v. Schoenborn*, 860 F.2d 1448, 1452 (8th Cir. 1988), *citing Heckler v. Community Health Servs.*, 467 U.S. 51, 60, 104 S. Ct. 2218, 2224, 81 L. Ed. 2d 42 (1984). Moreover, the Supreme Court has repeatedly indicated "that estoppel will rarely work against the government." *Conforti v. United States*, 74 F.3d 838, 841 (8th Cir. 1996), *citing Office of Personnel Management v. Richmond*, 496 U.S. 414, 423, 110 S. Ct. 2465, 2470-71, 110 L. Ed. 2d 387 (1990). "The Supreme Court has imposed a more stringent standard for estopping the government because there is a strong public interest in upholding the rule of law, even where hardship may result to individuals in particular cases." *Chien-Shih Wang v. Attorney General of United States*, 823 F.2d 1273, 1276 (8th Cir. 1987).

The Eighth Circuit has recognized that "even if equitable estoppel is applicable against the government only a showing of 'affirmative misconduct' will suffice." *Schoenborn*, 860

F.2d at 1452, (quoting *McDermott v. United States*, 760 F.2d 879, 882 (8th Cir. 1985)). There must be representation of a material fact, reasonable reliance and "affirmative misconduct" by an agency or government official. *See, e.g., Heckler, supra,* and *Rowden v. Warden*, 89 F.3d 536, 537, (8th Cir. 1996), *citing Olsen v. United States*, 952 F.2d 236, 241 & n.2 (8th Cir. 1991). The law in South Dakota is similar. *See Even v. City of Parker*, 1999 SD 72, 597 NW2d 670 (SD 1999), *citing City of Rapid City v. Hoogterp*, 179 NW2d 15, 17 (1970). In the present case, the FONSI and subsequent lease approval constitute the representations of material facts. Plaintiffs reasonably relied on these representations when Sun Prairie commenced construction on the project after the 30-day notice and appeal period had ended and no appeals had been filed. As foreshadowed in the preliminary injunction, the Court finds the Assistant Secretary's unilateral decision to void the lease, with or without authority, after the period within which to appeal had expired, without providing any findings of fact or conclusions of law to justify or explain his decision, and without extending adequate due process to plaintiffs constitutes the requisite "affirmative misconduct." Further affirmative misconduct occurred in the Assistant Secretary filing a pleading in federal court one day and the next day taking the very opposite position, especially after having not reviewed any significant portion of the administrative record. In addition to finding that the Assistant Secretary's actions were arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, the Court finds that his actions are unlawful under the doctrine of equitable estoppel, this being the rare case for the application of such doctrine against the federal government.

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It does not appear that the Eighth Circuit has held that the doctrine of laches cannot be applied against the federal government. Some courts regard the question of whether laches may be applied against the government as being completely unsettled. *See United States v. Administrative Enters.*, 46 F.3d 670, 672 (7th Cir. 1995), *citing JANA, Inc. v. United States*, 936 F.2d 1265, 1269 (Fed. Cir. 1991). Certain Supreme Court decisions indicate an unwillingness to conclude that laches cannot apply against the government in certain egregious circumstances. *See, e.g., Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 457-58, 112 L. Ed. 2d 435 (1990); *Heckler*, 467 U.S. at 60-61, 104 S. Ct. at 2224. If applied to the facts of the instant case, the elements of the doctrine—unjustifiable delay and prejudice—would be easily satisfied. *See, e.g., Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 602 (8th Cir. 1999), *citing Elvis Presley Enters. v. Capece*, 141 F.3d 188, 205 (5th Cir. 1998). The Assistant Secretary was aware of alleged NEPA violations as early as October of 1998,[10] but waited four to five months to make the decision to void the lease, a decision made in the face of pending litigation. Like the plaintiff in *Hubbard Feeds*, the Assistant Secretary has not posited any plausible excuse for the delay in making his decision. *Id.* Relying on the lease approval, Sun Prairie invested $5,000,000 on construction of phase I. Moreover, the bank financing for the project was

10. Assistant Secretary Gover was sent a courtesy copy of a letter from the EPA to Superintendent Burr dated October 15, 1998. The letter focused on the EPA's comments for the final EA. An enclosure, entitled "EPA NEPA Review Comments," accompanied the letter and detailed various claimed violations (Defs.' Position on Plaintiff's Motion for Temporary Restraining Order, Doc. 9, Exhibit 1).

linked to other ventures and the ramifications of the Assistant Secretary's decision threatened great and irreparable harm to Sun Prairie's established business reputation as well as that of the Tribe. Sun Prairie has been pressured, which could not come as a surprise to anyone, by its lenders who have naturally felt great anxiety about the ability of Sun Prairie to pay its loans and even to survive financially. Sun Prairie was required to pledge property in other states to secure its obligations for this project. It is high time that the BIA conduct its affairs in a timely and business-like manner to give confidence to Tribes, all Native Americans, their business partners, and lending institutions so that they can rely upon the BIA to do what they say they are going to do. The principles of equity dictate that the Assistant Secretary's decision cannot be upheld.

V. The Sufficiency of the Environmental Assessment under NEPA

Although the Assistant Secretary's letter voiding the lease fails to identify any specific shortcomings of the EA or offer any reasonable basis for requiring the preparation of an EIS, the Court will undertake the inquiry in order to resolve all challenges presented in this matter.

NEPA requires federal agencies to prepare an EIS statement relating to "proposals for . . . major Federal actions[11] significantly

11. Cases decided by other Circuits have generally held that approval of leases between tribes and private parties for economic development projects on tribal trust land constitute "major federal actions." *See, e.g., Sangre de Cristo*, 932 F.2d at 893 (involving a lease for a world class golf course and residential community on

(Cont'd)

affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Council on Environmental Quality ("CEQ") regulations implement NEPA and provide that an agency should prepare an environmental assessment for an action if the agency decides it is not categorically excluded from the impact statement requirement. The EA functions as a preliminary environmental inquiry. *See* 40 C.F.R. § 1501.4(b). The assessment "[s]hall include brief discussions of the need for the proposal, of alternatives . . . of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b). If the agency determines on the basis of the environmental assessment not to prepare an impact statement, it must prepare a finding of no significant impact, which

> present[s] the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it. . . . If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

40 C.F.R. § 1508.13.

(Cont'd)

approximately 5,000 acres of tribal land). Although the Court questions the rationale underlying some of these holdings based on tribal sovereignty considerations and the fact that the only federal action is approval of the lease, the parties do not contest the issue, and thus the Court will not address it.

Appendix B

In *Lockhart v. Kenops*, the Eighth Circuit held that the arbitrary and capricious standard should be applied to informal determinations of an agency, including an agency's decision not to prepare an EIS. 927 F.2d 1028, 1032 (8th Cir. 1991), *citing Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989). In a challenge to an agency's decision not to prepare an EIS, the initial burden is on the challengers to raise "a substantial environmental issue" that has been omitted from consideration in the EA or otherwise in the administrative record. *See Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 271 (8th Cir. 1980). Similarly, the decision to issue a FONSI is committed to the agency's discretion, the judgment made is presumptively correct, and the burden is on the challengers to prove that the decision is erroneous. *See Ringsred v. Dole*, 828 F.2d 1305, 1307 (8th Cir. 1987) and *Kuff v. Forest Serv.*, 22 F. Supp. 2d 987, 993 (W.D. Ark. 1998). If it is shown that the agency "took a 'hard look' at the project, identified relevant areas of concern, and made a convincing case for the FONSI," the environmental review is sufficient. *See Sierra Club v. United States Forest Serv.*, 46 F.3d 835, 838-39 (8th Cir. 1995). The adequacy of the EA as a basis for issuing the FONSI and approving the lease must be reviewed within the confines of the administrative record[12] and the Court must extend substantial deference to

12. When determining the sufficiency of the EA, "[t]he existing administrative record may be 'supplemented, if necessary, by affidavits, depositions, or other proof of an explanatory nature.'" *See, e.g., Sierra Club v. United States Army Corp of Engineers*, 771 F.2d 409, 413 (8th Cir. 1985) (quoting *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984), *cert. denied*, (Cont'd)

the decisions of the local BIA officials. *See Troy Corp. v. Browner*, 120 F.3d 277, 283 (D.C. Cir. 1997). A decision to forego preparation of an EIS will not be found arbitrary and capricious if it appears from the record that the decision was based on a "reasoned evaluation 'of the relevant factors.'" *Marsh*, 490 U.S. at 378, 109 S. Ct. at 1861. Moreover, a party challenging an agency decision under NEPA must provide evidence to substantiate any claim of environmental harm and "cannot simply doubt the FONSI . . . without pointing to more than speculative impacts." *Sierra Club*, 46 F.3d at 839. Having heard the evidence, this Court is convinced that nothing more than "speculative impacts" were put forward by the intervenors. Witnesses presented by intervenors were certainly people of good faith with honestly held convictions but nothing was presented to substantiate any claim of environmental harm. The defendants called no witnesses at all. The witness from the EPA admitted that she was "out of the loop." She admitted that as the project is now designed and will apparently be operated, there would be no environmental harm. By contrast, the testimony of the witnesses for plaintiffs was compelling. This is especially the case of the testimony and the evidence presented by BIA Superintendent Burr, a very credible witness.

Whether an EIS must be prepared to satisfy compliance with NEPA requirements is governed by a set of regulations

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(Cont'd)

469 U.S. 1158 (1985)). The Court is not persuaded by defendants' and intervenors' arguments that new and additional information was considered to mitigate the environmental impacts of the project which information was considered only after the FONSI was issued.

developed by CEQ. *See* 40 C.F.R. §§ 1500-1508 (1998). BIA has developed guidelines for implementing CEQ regulations, as have other agencies. *See* 30 BIAM Supplement 1 NEPA Handbook ("BIA NEPA Handbook"). CEQ regulations describe an EA as a "concise public document" which includes a "brief discussion" of (1) the need for proposed action, (2) alternatives to the proposed action, and (3) the environmental impacts of the proposed action and alternatives. *See* 40 C.F.R. § 1508.9. An EA is intended to provide "sufficient evidence" to determine if a full EIS is warranted but, because of the nature of the document, it is not intended to provide a comprehensive evaluation of NEPA issues. *Id.*; *see also Newton Country Wildlife Ass'n v. Rogers*, 141 F.3d 803, 809 (8th Cir. 1998) (quoting *Cronin v. United States Dep't of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990), to explain that "[a]n EA is a 'rough-cut, low-budget environmental impact statement . . .'"). Under CEQ regulations and the BIA implementation guidelines, the purpose of the FONSI is to briefly explain why the agency action will not have a significant effect on the human environment, but it need not reiterate all of the evidence accumulated in the administrative record. *Id.* at § 1508.13 and BIA NEPA Handbook, § 4.3H. Moreover, an EA may incorporate by reference, information and analysis already available in both NEPA-compliant materials, *see, e.g.*, 40 C.F.R. §§ 1500.4-.5, 1506.4 and BIA NEPA Handbook §§ 3.2(B), 4.5(B), and general background information, documents, and studies not prepared for NEPA purposes. *See Jackson County v. Jones*, 571 F.2d 1004, 1008 (8th Cir. 1978).

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In support of their position that the EA is sufficient and provides an appropriate basis for issuing the FONSI, plaintiffs emphasize that all project sites have been designed as "no discharge" facilities and that the design for the entire project incorporates state-of-the-art technology that surpasses current regulatory (both state and federal) and industry standards. Plaintiffs have refuted the accusation by defendants and intervenors that significant design changes were made to the project after the lease was approved, plaintiffs showing that any such changes were site-specific design details that were incorporated as the project progressed. Defendants argue that the EA does not contain sufficient information to warrant the issuance of the FONSI. They also contend that the EA does not identify all relevant areas of environmental concern nor does it support a finding that mitigation measures will reduce adverse impacts. Intervenors similarly point to alleged deficiencies of the EA, including a failure to consider both cumulative impacts and alternatives. They also contend that the BIA failed to provide for public participation. Intervenors argue that an EIS should have been prepared and each of the CEQ significance criteria should have been addressed.

The first question is whether the EA adequately identifies and describes the purpose of the project, alternatives to the proposed action, and the affected environment. *See* 40 C.F.R. § 1508.9; BIA NEPA Handbook 4.3B- D. (AR 3:0437.) Upon review of the 76-page EA,[13] it is readily apparent that the

13. BIA NEPA Manual 4.3 states: "An EA should normally be no more that [sic] 15 or 20 pages in length, unless it has been decided to prepare a longer, more detailed EA to aid in planning and decisionmaking (sic)." (AR 3:0436.)

document complies with these requirements. The EA concisely identifies the purpose of and need for the project: "The intent of the proposed facility is to bring economic development and opportunity to the Rosebud Sioux Tribe." (AR 1:00010.) Nothing more is required under BIA NEPA Handbook 4.3C (AR 3:0437). The EA also provides a description of reasonable alternatives, including "no action." *See* AR 1:00016-00021. In the initial paragraph of this section, the EA clearly provides that the size of the project facilities and the waste management systems would remain the same for each alternative considered. The size and capacity of the project were specified by Sun Prairie based on economic feasibility (AR 1:00016). This situation is of particular significance in the context of a private corporation acting as a third party with a tribe and the BIA in pursuing activities on tribal trust land. Unlike the far more common situation in which the federal agency itself is pursuing the activity, the only federal involvement is approval of the land lease. A private entity interested in bringing economic development opportunities to the reservations must primarily consider its own economic interests. Therefore, the alternatives evaluated in an EA are likely to be fewer in number and defined by economic feasibility factors.[14] The EA in the instant case considered primarily a "no-action" alternative and a "preferred" alternative. Alternatives regarding the size of the evaporation ponds and alternative locations were also considered (AR 1:12, 20) (Tr. at 60-61). Although the project requires approximately 1,135 acres, over

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14. *See, e.g., Kuff*, 22 F. Supp. 2d at 995, *citing Sierra Club v. Robertson*, 810 F. Supp. 1021, 1029 (W.D. Ark. 1992), to hold that "NEPA does not require agencies to consider alternatives that do not achieve the purpose of the proposed action."

4,000 acres were studied in the EA for the entire project (AR1:12.). This analysis of alternatives is sufficient. Defendants argue that the EA was flawed in not providing a reasonable range of alternatives in conjunction with an analysis of cumulative impacts and mitigation measures (Doc. 79, page 23—Defs.' supp. brief). Intervenors argue that the EA did not consider any alternative ways to provide economic opportunities for the Tribe or describe alternative designs for the proposed project that would reduce the environmental impacts, yet still provide job opportunities for the Tribe. (Intervenors'-Defs.' supp. brief at 24). The Court agrees with plaintiffs that the range of alternatives explored in the EA satisfies NEPA's requirements. A private corporation, with an established reputation in the pork production industry, knows which alternative is economically feasible—the preferred alternative. Given the significant need for economic development in the region, it would not be an effective or logical public policy to require private corporations to consider various alternatives which may not be in their economic self-interest, simply for the sake of considering alternatives in the EA.

The EA methodically identifies and details the affected environment, using the components set forth in BIA NEPA Handbook 4.3E (AR 3:0437)[15]. For example, with regard to

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15. BIA NEPA Handbook 4.3E provides: "The 'Affected Environment' (section § 1502.15) should succinctly describe the area in which the proposed action would occur. Page-sized maps of the general area and the project site help avoid superfluous description. Incorporation of sections of earlier environmental documents by reference may also be appropriate along with a summary of the key facts included in these references."

soils, the EA incorporates by reference maps contained in the *Soil Survey of Mellette County, SD* [White, 1975], and describes the three general categories of soil types within the project area and the soil characteristics (AR 1:00025-00027). The EA effectively addresses concerns regarding the water supply and possible water contamination. Among other documents, the EA incorporates by reference the Final EA for the Mni Wiconi Rural Water Project, which water project has anticipated water allocation to pork production facilities as one possible economic development project in the region (AR 1:51, 207, 704) and concludes that the project's impact on the water supply from the Missouri River will be less than negligible (AR1:767). The EA addresses the impact of the project on the Dakota and Ogallala aquifers (AR 1:00267-00276; Tr. at 202-207). As to water contamination concerns, the EA relies on the design of the project facilities and mitigation measures to adequately reduce the significance of the impacts (AR 1:00002, 00200; Tr. at 198-200). The EA contains detailed sections on fish and wildlife as well as social and economic conditions (AR 1:00034-00045), among other areas of environmental concern. Intervenors contend that the EA failed to analyze obvious impacts such as odor, disease transmission, and economic effects on the local economy, particularly the agricultural economy. However, as plaintiffs point out, an agency's failure to consider an arguably relevant factor does not, by itself, establish a NEPA violation. The administrative record may reveal that the factor was not sufficiently significant to merit discussion. *See Sierra Club*, 46 F.3d at 839 (upholding the sufficiency of the EA despite the lack of discussion on the impact of the activities on private land and finding that "[t]he EA did not make elaborate findings but nothing in the record suggests a need for more

extensive analysis"). Thus, applying this holding to the administrative record in the present case, the Court concludes that the EA adequately identified and detailed the impacts of the project on the environment.

The second question is whether preparation of an EIS was required based on the information contained in the EA. To reiterate, it is defendants' and intervenors' burden to prove that the decision not to prepare an EIS constitutes a violation of NEPA. In reviewing an agency's decision not to prepare an EIS, the Eighth Circuit has adopted the "hard look" doctrine. *Audubon Society of Central Ark. v. Dailey*, 977 F.2d 428, 434 (8th Cir. 1992). A court should consider four factors in determining whether an agency's decision to forego an EIS is arbitrary and capricious:

> (1) whether the agency took a hard look at the problem, as opposed to bald conclusions, unaided by preliminary investigation;
>
> (2) whether the agency identified the relevant areas of environmental concern;
>
> (3) whether, as to problems studied and identified, the agency made a convincing case that the impact is insignificant; and
>
> (4) if there was impact of true "significance," whether the agency convincingly established that changes in the project sufficiently minimized it.

Id., citing Cabinet Mountains Wilderness v. Peterson, 695 F.2d 678, 681-82 (D.C. Cir. 1982). The discussion under the first

question above, addressing the adequacy of the EA, leads to an affirmative answer to the first two prongs of the "hard look" doctrine.

As to the third prong, in making a significance determination, an agency must consider both the "context" and "intensity" of the impact. 40 C.F.R. § 1508.27. "Context" means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action . . . 40 C.F.R. § 1508.27(a). Intensity "refers to the severity of the impact" and the regulations direct an agency to consider a number of relevant factors in this regard:

> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts . . . Significance cannot be avoided by . . . breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historic resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat . . .

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27(b); BIA NEPA Handbook 5.2, 5.3B (AR 3:0445-0446).

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Intervenors attack the decision not to prepare an EIS, relying on each of the ten factors and primarily on concerns expressed by EPA and DENR (which state agency has no jurisdiction of any kind in Indian County). As previously discussed in the context of defendants' arguments, such reliance is misplaced. The intervenors' material evidence and arguments are speculative and conclusory, insufficiently supported by the record, or arguments attempted to be supported by evidence outside the scope of the administrative record.[16] Thus, the evidence presented by intervenors and defendants and their arguments clearly fail to meet the required burden of proof. The inquiry will focus on CEQ significance factors (1), (4), (8), and (9).

Intervenors contend that an EIS should have been prepared even if the effects of the project are "beneficial" as long as they are "significant." Citing the EPA and the DENR, intervenors argue that the project is likely to have adverse effects on the environment. As discussed previously, the EPA failed to comment within the comment period and the EPA letters that were finally sent to BIA officials lacked familiarity with many details of the project and mitigation measures (Tr. 272, 330, 342, 343). Similarly, the intervenors cite DENR comments that were filed after the comment period expired and that are not part of the administrative record. Both agencies' actions are questionable since neither agency became involved (if they wished to become involved) when they should have. Intervenors also argue that BIA Superintendent Burr admitted under oath that he believed there would be sufficient beneficial impacts from the project

16. These deficiencies apply to intervenors' challenges under CEQ significance factors (2), (3), (5), (6), (7), and (10).

(Intervenors'-Defs.' supp. br. at 18). However, the conclusion that a project will have purely beneficial impacts does not require preparation of an EIS. *See Friends of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 505 (6th Cir. 1995) (finding, "[t]he mere fact that the Fiery Gizzard will have a positive impact on the health and welfare of the people it serves does not compel the conclusion that the project may not go forward without an EIS that would not otherwise be required."). Thus, intervenors have failed to show that, under intensity factor one, an EIS should have been prepared.

Intervenors argue that the record overwhelmingly demonstrates that the known effects of the project on the quality of the human environment are highly controversial. (Intervenors'-Defs.' supp. br. at 19). As evidence, intervenors draw attention to the "highly critical" comments received by the BIA during the course of the EA. Particularly, intervenors stress the comments of the EPA and the DENR. However, intervenors' argument fails because "controversial" refers to the existence of a "substantial dispute . . . as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use." *Lockhart*, 927 F.2d at 1035 (quoting *Rucker v. Willis*, 681 F.2d 158, 162 (4th Cir. 1973)). Opposition alone is not sufficient to require that an EIS be prepared. *Rucker*, 681 F.2d at 162. Thus, an EIS should not be required based on intensity factor four.

As to the eighth factor, intervenors argue that the property is eligible for listing in the National Register and any action will affect and has already adversely affected the cultural history of the property. Specifically, intervenors argue that the BIA knew of the "Historic Indian Trail" and that no survey

was conducted of the project area. (Intervenors'-Defs.' supp. br. at 28). Plaintiffs did perform a Class I survey of the entire project area and reported in the EA that no resources of significance were discovered (AR 1:00070-00071). The EA also mandated a mitigation measure, namely that a Class III on-the-ground survey be performed at each site prior to construction (AR 1:00071). Again, the methods and measures used are in accord with both NEPA and NHPA protocols. Moreover, intervenors have failed to produce any evidence about how the project has adversely affected the cultural history of the property or will affect the property in the future. Furthermore, even if the trail was included in the National Register, this alone does not require the preparation of an EIS. *See Friends of the Astor v. City of Reading*, 1998 WL 684374 *7 (E.D. Pa.) (finding that "the fact the Astor [was] listed in the National Register [did] not alone require the preparation of an EIS when its demolition [was] proposed."). Accordingly, intervenors have not met their burden in proving that an EIS was required based on factor eight.

Under the ninth factor, intervenors state that the action may "adversely affect" endangered or threatened species. In particular, intervenors name the bald eagle, the black footed ferret and the sturgeon chub. Intervenors cite the September 18, 1998, letter from the U.S. Fish and Wildlife Service. However, this letter clearly states, "[w]e concur that construction at these sites is not likely to adversely affect the bald eagle (*Haliaeetus leucocephalus*) . . . [or the] black-footed ferret (*Mustela nigripes*)." The letter also confirms that the sturgeon chub (*Hybopsisgelida*) is a federal candidate species, namely a species precluded from both the threatened and endangered species lists. *See also* July 29, 1998, U.S.

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Fish and Wildlife Service letter (AR2:00107-00108); *Surfrider Found. v. Dalton*, 989 F. Supp. 1309, 1321 (S.D. Cal. 1998) (stating that defendant could reasonably rely on the findings of the U.S. Fish and Wildlife Service). Furthermore, under the mitigation measures included in the EA, if any listed species or critical habitat is discovered, the project must immediately cease and the U.S. Fish and Wildlife Service must be contacted (AR1:00054). Therefore, intervenors have failed to prove that an EIS was required based on factor nine.

The fourth prong of the "hard look" doctrine relates to mitigation measures. The BIA NEPA Handbook provides that mitigation measures may be properly integrated into a project to eliminate or substantially reduce potential environmental impacts if such measures are required by statute or regulation and are enforceable, or if the measures are integrated as part of the proposal (AR 1:64-67; 3:440, 529). The Court concludes that the mitigation measures identified in the EA, particularly those inherent in the design of the project facilities, are sufficient to support the FONSI. The testimony of Superintendent Burr during the preliminary injunction hearing as to the details of these mitigation measures and federal and tribal enforcement rules was very convincing, especially when compared to the testimony of EPA official Campbell who admitted that she was not familiar with many aspects of the mitigation measures and the various enforcement provisions specified in the EA (Tr. at 326-30). Thus, after considering the previously discussed four factors this Court determines that the decision to forego an EIS was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

Appendix B

Intervenors continue to allege that the local BIA officials failed to comply with the public notice and involvement requirements specified in 40 C.F.R. § 1506.6. However, upon closer review of the administrative record, it is clear that the local officials complied with the BIA Manual guidelines. *See* BIA NEPA Handbook 5.4B(2), AR 2:00201 and AR 3:0447. Even if the Court were to find that the availability of the FONSI and the final EA may not have been adequately communicated, notice deficiencies do not require setting aside an agency decision unless the complaining party can demonstrate that it was prejudiced by such deficiencies. *See, e.g., Environmental Coalition of Ojai v. Brown*, 72 F.3d 1411, 1416 n.5 (9th Cir. 1995), *citing Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 595 (9th Cir. 1988). Intervenors and defendants have not adequately demonstrated to the Court that the local BIA officials failed to comply with the CEQ regulations and BIA implementing guidelines and that they suffered prejudice as a result of such alleged non-compliance.

CONCLUSION

Defendants and intervenors have failed to meet their burden in raising a "substantial environmental issue" that was omitted in the EA or otherwise in the administrative record and in proving that the decision to issue the FONSI was erroneous. *See Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 271 (8th Cir. 1980) and *Ringsred v. Dole*, 828 F.2d 1300, 1302 (8th Cir. 1987). Further, the plaintiffs have shown that the local BIA and Area Director of the BIA took a "hard look" at the project. *See Sierra Club v. United States Forest Serv.*, 46 F.3d 835, 838-39 (8th Cir. 1995). Therefore, this

Court upholds the sufficiency of the EA as a basis for the FONSI. The decision not to prepare an EIS was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

It must be noted that a finding that the EA was sufficient under NEPA certainly does not suggest that the project will not be and should not be subject to close scrutiny and perhaps additional studies by defendants, intervening organizations, and others to ensure full compliance with environmental regulations. As such, the Court is convinced that plaintiffs and the BIA will continually attempt to incorporate new and better means, technological and otherwise, that help protect and preserve the environment. Plaintiffs will be expected to ensure that the project is operated and maintained exactly as was represented to the Court by plaintiffs.

Based on the foregoing,

IT IS HEREBY ORDERED THAT:

(1) Plaintiffs' application for a permanent injunction is granted as to the project. The defendants, Bruce Babbitt and Kevin Gover, and their employees, agents, and representatives, and the intervenors, Concerned Rosebud Area Citizens, South Dakota Peace and Justice Center, Prairie Hills Audubon Society and Humane Farming Association, and their employees, agents, and representatives are expressly restrained, enjoined, and prohibited from taking any actions, other than seeking relief by appeal or other appropriate judicial relief, which actions would have the purpose or consequence of interfering or attempting to interfere with

the construction or operation of the project that is the subject of this action. The BIA and its agents, and any other federal agency or official with appropriate jurisdiction, as well as the Tribe, are not enjoined or restrained from performing their duties associated with ensuring full compliance with federal and tribal environmental laws and regulations and compliance with other statutes and regulations related to the lawful operation of the project.

(2) All objections of defendants and intervenors are overruled.

Dated this 1st day of February, 2000.

BY THE COURT

s/ Charles B. Kornmann
CHARLES B. KORNMANN
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

By: s/ [illegible]
Deputy
(SEAL)

APPENDIX C — ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AUGUST 14, 2002

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2468/2471

Rosebud Sioux Tribe, etc., et al.,

Appellants,

Sun Prairie, etc.,

Appellee,

v.

James H. McDivitt, etc., et al.,

Defendants,

Concerned Rosebud Area Citizens Association, etc., et al.,

Intervenors-Defendants-Appellants.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Appendix C

Judge Loken would grant the petition for rehearing en banc.

(5128-010199)

August 14, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D — STATUTES INVOLVED

1. 25 U.S.C. § 81 currently states in relevant part:

§ 81. Contracts and agreements with Indian tribes

(a) In this section:

(1) The term "Indian lands" means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

(2) The term "Indian tribe" has the meaning given that term in section 450b(e) of this title.

(3) The term "Secretary" means the Secretary of the Interior.

(b) No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(c) Subsection (b) of this section shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

(d) The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or

contract that is covered under subsection (b) of this section if the Secretary (or a designee of the Secretary) determines that the agreement or contract—

(1) violates Federal law; or

(2) does not include a provision that—

(A) provides for remedies in the case of a breach of the agreement or contract;

(B) references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe; or

(C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action).

* * *

Appendix D

2. 25 U.S.C. § 415 currently states in relevant part:

§ 415. Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary

(a) *Authorized purposes; term; approval by Secretary*

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary.

* * *

Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height,

quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

Appendix D

Section 81 was revised in 2000 by Pub. L. No. 106-179, 114 Stat. 46; Section 415 was amended in 2000 by Pub. L. No. 106-216, 114 Stat. 343. Prior to those amendments the statutes read in relevant part as stated below.

3. 25 U.S.C. § 81 provided in 1998:

§ 81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Appendix D

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

Appendix D

4. 25 U.S.C. § 415 provided in 1998, in relevant part:

§ 415. Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary

(a) *Authorized purposes; term; approval by Secretary*

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary.

* * *

Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other

facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

APPENDIX E — LETTER FROM KEVIN GOVER, ASSISTANT SECRETARY — INDIAN AFFAIRS, UNITED STATES DEPARTMENT OF THE INTERIOR TO NORMAN G. WILSON, PRESIDENT, ROSEBUD SIOUX TRIBE DATED JANUARY 27, 1999

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JAN 27 1999

Norman G. Wilson
President
Rosebud Sioux Tribe
P.O. Box 430
Rosebud, South Dakota 57570

Dear President Wilson:

As you are aware, over the past few months, the Bureau of Indian Affairs (BIA) has been working closely with the Rosebud Sioux Tribe and the Bell Farming Group to address various issues related to the environmental review, construction and operation of the Rosebud Pork Production Facility. Unfortunately, despite these cooperative efforts, I have concluded that the August 14, 1998, *Environmental Assessment for Proposed Pork Production Facility (EA)* does not fully comply with the requirements of the National Environmental Policy Act (NEPA) and, therefore, is an insufficient basis for BIA's August 14, 1998, Finding of No Significant Impact (FONSI). Since BIA's approval of the

Appendix E

Land Lease between Rosebud Sioux Tribe and Sun Prairie is based, in part, on the FONSI and since compliance with NEPA is a prerequisite to approving the lease, my conclusion that the EA does not fully comply with NEPA and, therefore, does not support the FONSI, consequently means that BIA's lease approval is void. Therefore, and regretfully, I am hereby giving notice to you that BIA's September 16, 1998, approval of the Land Lease is, and always has been, void for failure to fully comply with NEPA. *See Sangre de Cristo Development Co., Inc. v. United States,* 932 F2d 891, 894 (10th Cir. 1991).

In reaching this conclusion, I want to be perfectly clear that my decision regarding BIA's lease approval is based solely on my conclusion that the EA does not fully comply with NEPA and does not reflect BIA's judgment of the technical or environmental soundness of the project. Since I believe this project can be designed, constructed and operated in a manner that is environmentally sound and because I continue to support the Tribe's efforts to bring economic opportunities to the reservation, I encourage you to resubmit to BIA a proposal to develop this project based on a lease arrangement with the Bell Farming Group or Sun Prairie. If you have any questions or would like to discuss this matter further, please contact me at (202) 208-7163.

Sincerely,

s/ Kevin Gover
Kevin Gover
Assistant Secretary-Indian Affairs

Appendix E

cc: Cora Jones, BIA Aberdeen Area Director
Larry Burr, BIA Rosebud Agency Superintendent
Syed Huq, Director, Water Resources & Environment, Rosebud Sioux Tribe
Kenneth Dewell, Attorney, Rosebud Sioux Tribe
Rich Bell, President, Bell Farming Group
Greg Fontaine, Attorney, Bell Farming Group

Supreme Court U.S.
FILED
JAN 15 2003
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No. 02-751

In the Supreme Court of the United States

SUN PRAIRIE, PETITIONER

v.

AURENE M. MARTIN, ACTING ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether a non-Indian party who negotiates a lease of tribal trust lands subject to the approval of the Department of the Interior under 25 U.S.C. 415 has prudential standing to challenge an administrative decision withdrawing an initial approval decision as invalid.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 286 F.3d 1031 (Pet. App. 1a-15a). The opinion of the district court is reported at 104 F. Supp. 2d 1194 (Pet. App. 16a-58a).

JURISDICTION

The decision of the court of appeals was rendered on April 5, 2002. A petition for rehearing was denied on August 14, 2002 (Pet. App. 59a-60a). The petition for a writ of certiorari was filed on November 12, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sought to lease tribal trust land of the Rosebud Sioux Tribe for the construction of a large hog farm. The Bureau of Indian Affairs (BIA), an agency within the Department of the Interior, initially approved the lease. Several private groups challenged the BIA's decision, asserting, among other things, that the BIA's lease approval violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* In the face of that lawsuit, the Interior Department determined that the lease approval violated NEPA and was void, which led to dismissal of that suit. Petitioner and the Tribe then brought this suit challenging the Interior Department's withdrawal of the lease approval, and the district court enjoined the Department from enforcing the withdrawal decision. Following a tribal election, the Tribe renounced its support for the suit and joined the other respondents in seeking reversal of the district court's decision. The court of appeals ruled that Sun Prairie lacked prudential standing to bring this suit on its own and remanded the case with instructions to dismiss the complaint for lack of jurisdiction.

1. Section 415(a) of Title 25 recognizes that Indian Tribes may lease tribal lands to private entities and further provides that each such lease must be approved by the Secretary of the Interior, who exercises that authority through the BIA. 25 U.S.C. 415(a); 25 C.F.R. 162.103. Similarly, contracts that encumber tribal lands for a period of seven or more years generally require the approval of the Secretary or her designee. 25 U.S.C. 81.

The BIA's determination to approve a tribal lease is subject to the requirements of NEPA, which requires

federal agencies to examine the environmental effects of specified actions and to inform the public concerning those effects. 42 U.S.C. 4332; see, *e.g.*, *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97 (1983). NEPA prescribes the necessary process but does not mandate particular substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989).

Under NEPA, an agency must prepare an environmental impact statement (EIS) whenever it proposes a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(C); see 40 C.F.R. 1508.27 (providing guidance on what effects are "significant"). An agency may prepare an environmental assessment (EA) to determine whether a proposed federal action will require an EIS. 40 C.F.R. 1501.3, 1501.4. If the agency determines through preparation of an EA that the proposed action will not have a significant environmental effect, the agency may issue a finding of no significant impact (FONSI) and decline to prepare an EIS. 40 C.F.R. 1501.4(b)-(c), 1508.13.

2. In the spring of 1998, petitioner and the Rosebud Sioux Tribe agreed to negotiate a lease for the development of a large hog farm on tribal trust land outside of the Tribe's Reservation, in Mellette County, South Dakota. Pet. App. 3a, 18a. Petitioner envisioned that the facility would have 13 separate sites, house 859,000 hogs per year, require 1,686,000 gallons of water daily, and occupy 1135 acres of land. Gov't C.A. App. 32, 34, 38, 41.

After the Tribe and petitioner submitted the proposed lease for approval under 25 U.S.C. 415(a), the BIA reviewed the proposal under NEPA. Pet. App. 18a; Gov't C.A. App. 23, 25. Based on the EA that a contractor prepared, the BIA later issued a FONSI, concluding that the anticipated environmental effects

were insufficient to warrant an EIS. Pet. App. 2a-3a, 18a. Shortly thereafter, the Tribe and petitioner signed the lease and the BIA approved the transaction. *Id.* at 3a-4a, 18a. Petitioner immediately began construction at the first site. *Id.* at 4a.

3. A coalition of public interest groups and members of the Tribe opposing the project filed a complaint in the United States District Court for the District of Columbia alleging, among other things, that the BIA had not complied with NEPA in connection with approving the lease. Those plaintiffs sought to enjoin the effectiveness of that approval. Pet. App. 4a, 19a. That lawsuit prompted the Department of the Interior to examine the BIA's lease approval decision. The Interior Department determined that the EA did "not fully comply" with the requirements of NEPA and thus provided "an insufficient basis" for the FONSI. *Id.* at 69a-70a. Accordingly, the Interior Department concluded that the lease approval was void for failure to fully comply with NEPA. *Id.* at 70a. Because the Interior Department concluded that the lease approval decision was void, the parties entered into a joint stipulation to dismiss the plaintiffs' suit without prejudice. *Id.* at 4a, 20a.

4. Petitioner and the Tribe then brought this suit in the United States District Court for the District of South Dakota, under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to challenge the Interior Department's decision to declare the lease approval void. Pet. App. 4a, 6a, 20a. They claimed that the Interior Department had violated various statutes, including 25 U.S.C. 81, 25 U.S.C. 415, and NEPA. Pet. App. 5a. Petitioner and the Tribe sought injunctive relief and declaratory rulings that the Department lacked authority to declare

the lease approval void and that, even if authorized, the decision was arbitrary and capricious. Pet. 5-6; Pet. App. 4a, 20a. The plaintiffs from the earlier litigation in the District of Columbia intervened as defendants. *Id.* at 4a, 22a.

The district court issued an order and judgment granting a permanent injunction. Pet. App. 16a-58a. The court ruled that, assuming that the agency had authority to reconsider its initial lease approval, the Interior Department acted arbitrarily and capriciously in withdrawing its approval, and that the doctrines of equitable estoppel and laches applied here. *Id.* at 25a-40a. The district court also ruled that the BIA's decision to issue a FONSI rather than prepare an EIS was not arbitrary or capricious. *Id.* at 40a-56a. Based on those rulings, the district court declared that the Interior Department and the intervenors were "expressly restrained, enjoined, and prohibited from taking any actions, other than seeking relief by appeal or other appropriate judicial relief, which actions would have the purpose or consequence of interfering or attempting to interfere with the construction or operation of the project that is the subject of this action." *Id.* at 57a-58a.

5. The Interior Department and the intervenors appealed. Pet. App. 5a. While those appeals were pending, the Tribe held a tribal council election, and the newly elected tribal council withdrew its support for the lawsuit. The Tribe then sought and received permission from the court of appeals to realign itself as an appellant. *Ibid.* Following briefing on a variety of challenges to the district court's decision, the court of appeals concluded that petitioner lacked prudential standing to bring and maintain the suit on its own. *Id.* at 3a, 5a-14a.

The court of appeals concluded that, under this Court's prudential standing doctrine, petitioner could not establish standing to bring suit under 25 U.S.C. 81 and 25 U.S.C. 415 because petitioner had no interests that arguably fall within the zone of interests protected or regulated by those statutes. Pet. App. 7a-9a. The court of appeals reasoned:

> Because the statutes relied upon by Sun Prairie were enacted to protect Indian interests, we believe it would be inconsistent to interpret them as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribes' interests.

Id. at 9a. The court also concluded that petitioner lacked prudential standing under other statutes. *Id.* at 10a-14a. The court of appeals denied a petition for rehearing and for rehearing en banc. *Id.* at 59a-60a.

ARGUMENT

This Court has set out prudential standing principles requiring that federal courts ascertain that plaintiffs are the proper parties to litigate otherwise justiciable controversies. The court of appeals correctly identified those established principles, but did not properly apply them to the specific facts of this case. The court of appeals' decision is accordingly mistaken, but it satisfies none of the usual criteria for this Court's review. The decision does not conflict with any decision of this Court or other courts of appeals, but instead merely reflects a misapplication of settled legal principles to an unusual factual situation. Contrary to petitioner's contentions, the decision does not present any issue of general importance that would warrant this Court's resolution.

1. This Court has recognized prudential limits on the federal courts' exercise of Article III jurisdiction. See, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). Under the doctrine of prudential standing, "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Ibid.* In the case of a suit brought under the APA, the plaintiff must establish that its grievance is arguably within the zone of interests regulated or protected by the statute that would in turn provide the substantive basis for legal relief. See *id.* at 162-163; *Barlow* v. *Collins*, 397 U.S. 159, 164-165 (1970). The Court has further made clear that

> where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Clarke v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). The plaintiff's interests must be evaluated "not by reference to the overall purpose of the Act in question * * * but by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-176.

2. The court of appeals correctly recognized the foregoing principles. Pet. App. 6a-7a. Applying those principles to the Indian lease context, the court also correctly recognized that a would-be lessee of Indian land generally lacks prudential standing to challenge the Interior Department's administrative decision *not* to approve a proposed lease under 25 U.S.C. 81 and 25 U.S.C. 415. Pet. App. 9a. The statutory provisions re-

quiring federal approval of certain contracts and leases "are intended to protect only Native American interests." *Id.* at 8a. They exist to ensure that Indians do not lose control of their trust property through improvident dealings and unconscionable contracts. See *In re Sanborn*, 148 U.S. 222, 227 (1893); *Western Shoshone Bus. Council* v. *Babbitt*, 1 F.3d 1052, 1054-1056 (10th Cir. 1993). Thus, as petitioner acknowledges, non-Indians whose interests conflict with Indian interests generally lack prudential standing under those provisions. See Pet. 15-16.

The court of appeals erred, however, in failing to recognize the significantly different situation that arises once the Interior Department has formally approved a proposed lease, but then withdraws its approval. The Interior Department has the power, inherent in its authority to approve a lease, to reconsider its decision and withdraw its approval. See *United Gas Improvement Co.* v. *Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Belville Mining Co.* v. *United States*, 999 F.2d 989, 997 (6th Cir. 1993); *Dun & Bradstreet Corp. Found.* v. *United States Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991); *Iowa Power & Light Co.* v. *United States*, 712 F.2d 1292, 1296-1297 (8th Cir. 1983), cert. denied, 466 U.S. 949 (1984). "The power to reconsider is inherent in the power to decide." *Eifler* v. *Office of Workers' Comp. Programs*, 926 F.2d 663, 666 (7th Cir. 1991); *Albertson* v. *FCC*, 182 F.2d 397, 399-400 (D.C. Cir. 1950). But when the Interior Department makes the decision to withdraw a previous approval of a proposed lease, the Interior Department does so in the face of the ripened expectations of both the Indian lessor and the non-Indian lessee who may have taken action or made

financial commitments based on the approval. In those circumstances, it is reasonable to conclude that Congress intended that the non-Indian lessee may seek judicial review of the Interior Department's withdrawal decision.

3. As the United States explained in its response to petitioner's petition for rehearing en banc, the court of appeals erred in concluding that petitioner lacked prudential standing to pursue its claim. See Fed. Appellants' Resp. to Sun Prairie's Pet. for Reh'g En Banc 2-7. The United States did not take a position on whether the court of appeals should rehear the case en banc. Instead, the United States urged the court of appeals to grant panel rehearing, recognize its error and decide the merits of whether the Interior Department acted lawfully in withdrawing its approval. *Id.* at 7-10. The court of appeals, however, declined to do so, with only a single judge voting for rehearing en banc. Pet. App. 59a-60a. While the United States submits that the court of appeals should not have relied on prudential standing as a basis for dismissing petitioner's complaint, that court's decision does not warrant this Court's review.

As petitioner implicitly acknowledges, the decision of the court of appeals does not squarely conflict with any decision of this Court or another court of appeals. The court of appeals itself did not identify any controlling precedent, and petitioner does not suggest that the court of appeals' decision has resulted in a conflict among the decisions of the courts of appeals that warrants resolution by this Court. The absence of a conflict is not surprising. The Interior Department does not often withdraw a prior lease approval and, hence, the courts would rarely have any occasion to address whether a non-Indian lessee has prudential

standing to challenge a withdrawal decision that the Tribe itself does not challenge.

Faced with the absence of controlling precedent, the court of appeals applied general prudential standing principles to a novel factual situation before it. The court of appeals correctly identified the controlling legal principles governing the prudential standing inquiry but, in the words of petitioner, "misapplied" them to the facts of this case. Pet. 14. That error does not warrant this Court's review. This Court does not ordinarily grant review to examine a court of appeals' application of settled legal principles to a particular factual situation. See Sup. Ct. R. 10. The Court has no reason to do so in this case, which presents highly unusual facts that are very unlikely to recur.

The prudential standing dispute in this case arose only because: (1) the BIA initially approved a lease between a Tribe and a non-tribal party that was likely to have substantial environmental impacts; (2) the Interior Department later determined, in the face of a third-party's legal challenge, that the NEPA-mandated environmental analysis was inadequate; (3) the Interior Department further determined that approval should be withdrawn because the legal challenge would most likely lead to invalidation of the lease; (4) the Tribe and petitioner initially challenged the Interior Department's action through a second lawsuit, but the Tribe withdrew from that lawsuit at the appeal stage; and (5) petitioner alone sought to continue prosecuting the appeal. There would be little value in the Court's reviewing the court of appeals' application of prudential standing principles to that distinctive situation because that fact pattern is unlikely to recur.

Petitioner suggests (Pet. 10-13) that the court of appeals' application of prudential standing principles in

this case may discourage non-Indian investment and depress economic development in Indian country. We do not believe that that concern warrants review of the issue presented here in the present circumstances, especially in the absence of a circuit conflict. It was a distinctive series of events that led to the court's decision in this particular case and that correspondingly may limit the range of situations in which the issue could arise. Furthermore, since the time that the court of appeals issued its decision, petitioner has filed a new suit challenging the same administrative decision under the Due Process Clause. *Sun Prairie* v. *McCaleb*, Civ. No. 02-3030 (D.S.D. filed Aug. 15, 2002). As a result, it is far from clear that petitioner will not ultimately be able to obtain judicial review of the Interior Department's decision, much less that other potential lessees would be significantly deterred from entering into other leases with Indian Tribes.

Petitioner is also incorrect in characterizing the current circumstances as resulting solely from the Interior Department's "unilaterally withdrawing its previous approval." Pet. 2; see Pet. 10. Petitioner itself shares responsibility for failing to recognize that locating a gigantic hog farm on Indian trust land would require an adequate environmental analysis. The Interior Department withdrew the lease approval in the face of a third-party NEPA challenge that likely would have resulted in the invalidation of the initial lease approval decision. That lawsuit quite plausibly asserted that a project that produced 859,000 hogs per year, required 1,686,000 gallons of water daily, and occupied 1135 acres of land would indeed have a significant impact on the environment, within the meaning of NEPA, and would require an EIS. The Interior Department's decision to declare the lease void simply avoided wasteful litigation

that, in the end, would most likely have led to invalidation of the lease approval and have left petitioner without a valid lease to support its hog farm operation.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
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ELIZABETH A. PETERSON
TODD S. KIM
Attorneys

JANUARY 2003

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* There is no merit to petitioner's suggestion (Pet. 10) that the hog farm at issue here is itself so exceptionally important that the Court should grant review. Petitioner asserts that it has spent several million dollars thus far and potentially could invest $100 million in the entire project. Pet. 2-4 & n.3, 10. Petitioner, however, chose to proceed with the project despite its awareness that an inadequate environmental analysis could lead to invalidation of the lease. In any event, the decision of the court of appeals does not resolve the fate of the project. The project may yet continue, in whole or in part, depending on factors apart from the outcome of this petition.

Supreme Court U.S.
FILED
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No. 02-751

IN THE

Supreme Court of the United States

SUN PRAIRIE, A PARTNERSHIP,

Petitioner,

v.

NEAL A. McCALEB, ASSISTANT SECRETARY – INDIAN AFFAIRS, GALE A. NORTON, SECRETARY OF THE INTERIOR, ROSEBUD SIOUX TRIBE, CONCERNED ROSEBUD AREA CITIZENS, SOUTH DAKOTA PEACE AND JUSTICE CENTER, PRAIRIE HILLS AUDUBON SOCIETY, and HUMANE FARMING ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ROSEBUD SIOUX TRIBE

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QUESTION PRESENTED

An Indian tribe may lease land to a non-Indian party with the approval of the Secretary of the Interior or her designee pursuant to 25 U.S.C. § 415. The Secretary of the Interior must likewise approve any agreement that encumbers Indian lands for that agreement to be valid under 25 U.S.C. § 81. The question presented is:

> Once a lease of Indian lands to a non-Indian party has received federal approval under 25 U.S.C. §§ 81 and 415, but that party knew or should have known that the approval was likely to be revoked, does that non-Indian party have prudential standing to challenge a federal agency's withdrawal of approval.

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The Rosebud Sioux Tribe ("Tribe") opposes the petition for writ of certiorari filed by Sun Prairie and it should be denied.

STATEMENT OF THE CASE

The Sun Prairie pork production facility is the latest of various projects that have been proposed to the Tribe by outsiders with no interest or stake in the Rosebud Indian Reservation other than generation of profits at the expense of the environment. Over the years, the Tribe has been targeted as a site for a massive commercial dump, a commercial chicken farm, and a feedlot for cattle. *See generally Rosebud Sioux Tribe v. United States*, 714 F. Supp. 1546 (D.S.D. 1989). Like proposals that the Tribe has successfully fended off in the past, the Sun Prairie production facility threatens to do grave and lasting damage to the Rosebud Indian Reservation.

The pork production facility to be constructed in this case was to be built upon 1,135 acres of land belonging to the Tribe in Mellette County, South Dakota. The area encompassed is part of the Rosebud Indian Reservation. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); Act of March 2, 1889, Ch. 405, § 2; 25 Stat. 888. All of the land is held in trust by the United States and is Indian country under 18 U.S.C. § 1151.

Any lease involving Indian trust land, such as involved in the present case, requires the approval of the Secretary of Interior ("Interior"), who typically acts through the BIA. *See* 25 U.S.C. § 415(a); 25 C.F.R. § 162.5. Lease approvals are actions subject to the requirements of the National Environmental Protection Act ("NEPA"), which requires

federal agencies to examine and inform the public about the environmental effects of proposed federal actions. *See* 42 U.S.C. § 4332; *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983); *South Dakota v. Andrus*, 614 F.2d 1190, 1194 (8th Cir. 1980). Under NEPA, to ensure that adequate consideration has been paid to environmental issues before an agency proposes a project, an agency must prepare an environmental impact statement ("EIS") whenever it proposes "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

The sheer magnitude of the production facility is staggering. Once built, it would consist of 13 sites and the construction of 232 barns, most of which will house 2,000 animals each. App. 34, United States, *Sun Prairie v. Gover*, Nos. 2468 and 2471 (8th Cir.). Once completed, the facility would house 859,000 hogs per year, more than the human population of South Dakota, and require the use of 1,686,000 gallons of water daily, equivalent to one of the largest towns in South Dakota. *Id.* 32, 34. The manure and urine would be washed into ponds covering 550 acres of trust land. More waste would be produced by the hogs at the facility than all human residents in South Dakota. Once built, it would be one of the three largest pork production facilities in the United States. All of this to be built and maintained on pristine prairie covered with native grasses previously undisturbed from its original condition. Odor and run off from animal waste are among the chief contemporary threats to habitat and water quality in this country. *See generally* John D. Burns, *The Eight Million Little Pigs–A Cautionary Tale; Statutory And Regulatory Responses to Concentrated Hog Farming*, 31 Wake Forest L. Rev. 851 (1996).

A draft environmental assessment ("EA") concluded that the project would not have a significant effect[1] on the environment and was released for public comment at the end of June, 1998. App. 235, United States, *Sun Prairie v. Gover*, Nos. 2468 and 2471 (8th Cir.). The project generated a great deal of controversy in the community, and the majority of comments on the draft EA were negative. *Id.* 108-230. Many commenters specifically stated that the draft EA was inadequate and requested preparation of an EIS. Despite the negative comments and the controversy surrounding the project, BIA declined to issue an EIS and instead released the final EA on August 14, 1998. *Id.* 24. In many instances, the final EA concludes that the proposal could have significant impact but that these impacts would be mitigated. However, the manner in which mitigation could be accomplished was not always set out. *Id.* 80-95.

Based on the information in the EA, BIA issued a FONSI on the same day and concluded that no EIS was necessary.

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1. The regulations implementing NEPA provide guidance to agencies on what degree of impact is "significant" and will thus require the preparation of an EIS. In determining whether an impact is significant, an agency should consider both the context of an action and its intensity. *See* 40 C.F.R. § 1508.27. The regulations implementing NEPA further provide that an agency may prepare an environmental assessment ("EA") to determine whether a proposed federal action will require an EIS. *See* 40 C.F.R. §§ 1501.3, 1501.4. The EA should be a concise document containing "sufficient evidence and analysis" for the agency to determine whether the proposed action will have a significant impact on the environment. 40 C.F.R. § 1508.9(a)(1); *see* 40 C.F.R. §§ 1501.4 (b)-(c), 1508.13. If the agency determines through the preparation of an EA that the proposed action will not have such an impact, the agency may decline to prepare an EIS after issuing a finding of no significant impact ("FONSI"). *See* 40 C.F.R. §§ 1501.4 (b)-(c), 1508.13.

On September 1, 1998, after release of the final EA, the Environmental Protection Agency ("EPA") sent the Tribe comments on the draft EA. It indicated "areas of concern including ground water and surface water protection, odor, incomplete information for analysis of impacts (direct, indirect, and cumulative), lack of a range of alternatives and insufficient defined monitoring and mitigation measures." App. 24-28, Intervenors, *Sun Prairie v. Gover*, Nos. 2468 and 2471 (8th Cir.). On October 15, 1998, EPA sent comments on the final EA, in which it elaborated on these and other problems and concluded again that the EA was "inadequate" and that the "FONSI was not supported by the information" therein. *Id.* 32.

The lease providing for construction of the hog production facility in this case was signed on September 8, 1998, and approved by the BIA Area Director on September 16, 1998. Sun Prairie's desire to enter into a lease with the Tribe without the attendant delay, expense, and uncertainty of an EIS was accomplished. Construction commenced on site 1. However, controversy over approval of the lease without an EIS continued unabated. A short time later, after approximately nine weeks of construction, on November 23, 1998, a coalition of environmental groups and members of the Tribe opposing the project filed a complaint in the United States District Court for the District of Columbia seeking to set aside approval of the lease alleging, *inter alia*, noncompliance with NEPA. While the proceedings continued in the District of Columbia suit, the Department of Interior was reconsidering its initial lease approval decision, even informing the Tribe in December that it would be withdrawing its approval. On January 27, 1999, before any briefs had been filed in the District of Columbia action, Assistant Secretary Gover sent a letter to the Tribe advising

that the EA did "not fully comply" with the requirements of NEPA and thus provided "an insufficient basis" for the FONSI. Accordingly, Interior concluded, the lease approval was "void for failure to fully comply with NEPA." On February 1, 1999, based on the decision to withdraw approval of the lease, the District of Columbia suit was dismissed without prejudice.

Two days later, on February 3, 1999, Sun Prairie instituted a suit in the United States District Court of South Dakota seeking, *inter alia*, a declaration that Interior lacked authority to withdraw approval of the lease and, even if it had such authority, the decision was arbitrary and capricious. Sun Prairie was not willing to await the preparation of an EIS, but rather was intent on undertaking any action that would allow it to proceed with construction and operation of the pork production facility. On March 2, 1999, the District Court for South Dakota entered an order granting a preliminary injunction against the United States and Intervenors from interfering with the construction or operation of the project. An appeal was taken to the Eighth Circuit by the United States and Intervenors. Sun Prairie continued to proceed with construction despite the pendency of the appeals. The Tribe on appeal was permitted to realign itself with the United States and Intervenors.[2] On February

2. Although the Tribal Council in 1998 supported the project, that was long before there was any critical environmental analysis of the project. The Tribe had no experience operating a hog farm, and its information about the project came in large part from Sun Prairie. It was the plan to get the project approved by the BIA in the quickest manner possible to avoid the "delay" and "inconvenience" occasioned by the preparation of an EIS. Ever since the Tribe came to realize, in 1999, the extent and sweeping nature of the environmental dangers posed by the project, it has consistently called for a stop to any further (Cont'd)

3, 2000, the preliminary injunction was made permanent. Appeals in June, 2000, were taken to the Eighth Circuit from that decision also. Sun Prairie continued to construct and operate the facility knowing full well the risks of doing so.

The Tribe instituted a suit against Sun Prairie in the Rosebud Sioux Tribal Court, as permitted under the lease at issue in this case, on April 24, 2001, seeking to prohibit any construction of site 2 because the Tribe had not received or approved plans for the site, had not approved the location, the anaerobic digesters were not operating properly, lack of compliance with Tribal laws pertaining to appropriation of water, and failure of Sun Prairie to provide the Tribe with all licenses and permits. Sun Prairie sought and was awarded a judgment on May 18, 2001, from the United States District Court of South Dakota, prohibiting the Tribe from maintaining the suit in Tribal Court.[3] An appeal by the Tribe and Intervenors was taken to the Eighth Circuit and a motion

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(Cont'd)
construction. A referendum of the entire Tribe was conducted in 2000 where tribal members voted decisively against the project. Every Tribal Council since 1998 has been against it.

3. At a hearing held on May 11, 2001, in that proceeding, Judge Kornmann was uncomfortable with Sun Prairie's high-stakes gamble in this case as he made clear at 106:

> I have told Sun Prairie, I told them that in the temporary restraining order that I issued, that they are clearly proceeding at some risk. They are spending a lot of money there and if it turns out that I was wrong and the Court of Appeals reverses and says the lease was void, they have got a lot of money spent there and probably no way to recover it, at least in the face of long delays in going through the environment impact statement.

for a stay pending appeal, opposed by Sun Prairie, was denied on June 13, 2001. The appeal is still pending in the Eighth Circuit Court of Appeals. Sun Prairie continued to build while the action described in this paragraph was pending in Tribal Court, the District Court of South Dakota, and the Eighth Circuit Court of Appeals.

The decision of the Eighth Circuit to which the petition for writ of certiorari in this case is directed was filed on April 5, 2002.[4] Sun Prairie decries the unfairness of the decision and the amount of money that it has expended in constructing and operating the pork production facility up to the time of the Eighth Circuit decision. However, its argument rings hollow. Sun Prairie knew of the substantial opposition to the project on September 16, 1998, the date the lease was initially approved by the BIA.[5] On November 23, 1998,

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4. The panel consisted of Judge Wollman, who was Chief Judge at the time of oral argument, and Judge Hansen, who was Chief Judge at the time that the opinion was written. App. A-2a n. 3, *Sun Prairie* petition. There were no dissents.

5. Sun Prairie indicates at 3 of its petition that no challenge or appeal was taken from the approval of the lease on September 16, 1998. Actually on September 4, 1998, five individuals, including one tribal member, sent a letter to the BIA Aberdeen Area Office asking for clarification of the procedures for objecting to the FONSI upon which the lease approval was based. *See* Add. 2, Brief of Rosebud Sioux Tribe, *Sun Prairie v. Gover*, Nos. 2468 & 2471 (8th Cir.). The letter cited 25 C.F.R. Part 2 and asserted those procedures applied to the FONSI; it also asked the BIA for guidance on the appeal process. The Area Director responded on September 17, 1998, indicating erroneously that the FONSI did not qualify for appeal under 25 C.F.R. Part 2. *Id.* at Add. 3. The local BIA offices were working with Sun Prairie and the Tribe. Sun Prairie proceeded with construction even though interested parties were trying and perhaps did file an appeal from the issuance of the FONSI.

a short nine weeks after lease approval, an action was filed to void the September 16, 1998, approval due to BIA's failure to prepare an EIS. Despite the glaring risks of constructing a massive hog farm in the face of a reasonable, even compelling NEPA challenge, Sun Prairie elected to continue construction.

Even after the decision of the Eighth Circuit on April 25, 2002, Sun Prairie continues in the courts. On August 14, 2002, it filed another action in the United States District Court of South Dakota, Central Division, against Gale Norton, Neal McCaleb, and the Rosebud Sioux Tribe seeking, *inter alia*, declaratory relief and money damages for constitutional violations, impairment of contract, and breach of the lease agreement.

Although members of the Tribe struggle economically, "Sioux culture has always been based on a strong interrelationship between the people and the land." Deloria, *American Indian Policy In The Twentieth Century*, University of Oklahoma Press 165 (1985). "We are earth people because we live close to our mother, the Earth. . . . (W)e are part of the fire and a part of the rock, or earth, and a part of the water and a part of the green, or living." Black Elk, *The Sacred Ways Of A Lakota*, Harper & Row 3-4 (1990). "(S)uccessful (economic) development is possible only if it builds on existing cultural values." Deloria, *supra* at 160. The environmental dangers presented by the pork production facility run contrary to the culture of the Tribe and cannot be ameliorated by the employment of small numbers of Indian people.[6]

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6. Sun Prairie and the Tribe disagree on the number of Indian people regularly employed at the facility. The Tribe maintains that approximately 18 tribal members hold jobs, and many of those jobs are in manure management.

Sun Prairie places great emphasis on the Tribe's alleged need for economic development. However, the financial aspects of the lease agreement at issue in this case are as tragically one sided as its environmental and social aspects. Although the Tribe is contractually entitled to be paid 25% of the profits from the project, the Tribe has never received a penny from Sun Prairie except for a token payment that was offered and rejected. Though the Tribe maintains that Sun Prairie is obligated under the lease in question to pay the Tribe for the millions of gallons of groundwater that it has pumped to wash away hog waste, Sun Prairie has never paid a penny for the water used which has a market value in excess of $100,000 per year. The hog production facility at the heart of this case has cost the Tribe much more than it has received and that will be the situation indefinitely.

I. THIS CASE DOES NOT INVOKE ANY QUESTION OF FUNDAMENTAL IMPORTANCE TO THE DEVELOPMENT OF TRIBAL TRUST LAND.

In approving the lease at issue in this case, the BIA had a fiduciary duty to the Tribe to ensure that the construction and operation of the hog production facility in light of the known environmental risks did not damage or reduce in value the land. As trustee of the land, the BIA enjoyed wide discretion under trust principles to take such action as necessary to protect the land. This fiduciary duty has been longstanding and is of common knowledge among those who deal with Indian trust land. The BIA's first obligation was to the Tribe and the land that it held in trust.

The concept of federal trust responsibility to Indians lies on bedrock set forth in many cases evolving over a century and a half. In *Cherokee Nation v. Georgia*, 30 U.S.

(5 Pet.) 1 (1831), Chief Justice Marshall recognized the special status of Indian tribes under the law and concluded that "(t)heir relation to the United States resembles that of a ward to his guardian." *Id.* at 17. The trust principles first articulated in *Cherokee Nation v. Georgia*, *supra*, have been applied in many specific situations to establish and protect the rights of Indian tribes and individuals. *E.g.*, *United States v. Mason*, 412 U.S. 391 (1973).

More recently, in *Mitchell v. United States*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), this Court spoke again on the subject of trust responsibility. *Mitchell II*, *supra*, concluded, like in the present case, that the statute and regulations now before us clearly "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibility." 463 U.S. 224. *See Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002); *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 1604 (2002).

The decisions of this Court reviewing the legality of administrative conduct in managing Indian property have held officials of the United States to "moral obligations of the highest responsibility and trust" and to "the most exacting fiduciary standards," *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). Ordinary standards of a private fiduciary must be adhered to by federal agencies administering Indian property or federal programs. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *Navajo Tribe v. United States*, 364 U.S. 320, 322-324 (Ct. Cl. 1966). And it is hornbook law that a trustee's competing interests do not excuse a breach of fiduciary duty. *Navajo Nation v. United States*, 263 F.3d 1325, 1332 (Fed. Cir. 2001). *See Brown v.*

United States, 86 F.3d 1554, 1557 (Fed. Cir. 1996) (fiduciary duty allegedly breached by BIA's failure to cancel lease).

The BIA had a trust responsibility to the Tribe to treat and protect its land the same as a private fiduciary would do. A trustee has a duty to protect trust property against damage or destruction. Bogert, *The Law of Trusts and Trustees* 346 (2d ed. 1980). In determining that the development contemplated by the lease in this case should not proceed, and that the protection of the land could not be assured based on the EA, the Assistant Secretary was carrying out his fiduciary duties. No chance could be taken that the waste lagoons were not properly built, that surface and ground water were not properly protected, that air would not be fouled, or that identified discrepancies and lack of information would not result in harm or catastrophe to the property. He withdrew his approval of the lease and invited the parties to resubmit a project that "can be designed, constructed and operated in a manner that is environmentally sound." App. E-69a, *Sun Prairie* petition. The Assistant Secretary possessed a wide range of discretion and his decision is entitled to considerable deference taking into account his trust responsibility to act in the best interest of the Rosebud Sioux Tribe.

Sun Prairie's position has been from the beginning unreasonable. Sun Prairie negotiated a lease agreement to build one of the largest hog production facilities in the nation on Indian trust land without the prior completion of an EIS, an unprecedented action by itself. After the lease approval was rescinded, Sun Prairie resisted the reasonable course of action which would have been to have an EIS completed and continued its unreasonable course by constructing and operating the facility knowing full well that the decision of

the district court enjoining the BIA from withdrawing its approval would be appealed. Not one single potential investor on an Indian reservation will be deterred by Sun Prairie's situation because Sun Prairie's actions were unreasonable and will not be repeated by other potential investors.

Private investors need not be hesitant to do business on the Rosebud Indian Reservation. A functioning tribal court of record operates. *Hornell Brewing Company v. Rosebud Sioux Tribal Court*, 133 F.3d 1087-1088 (8th Cir. 1998). The court is staffed by three full time law trained trial judges with an appeals court available. One member of the appeals court is a professor from the University of South Dakota Law School. *See In the Matter of the Estate of Crazy Horse v. Heileman Brewing Company*, 23 Indian L. Rptr. 6104 (1996) (Pommersheim). The Tribe itself enters into commercial contracts where it waives its sovereign immunity from suit and participates in different forums for the resolution of disputed claims. *Rosebud Sioux Tribe v. Val-U Construction Company*, 50 F.3d 560, 562 (8th Cir. 1995) (sovereign immunity waived by arbitration provision); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989) (corporate charter waived sovereign immunity).

Sun Prairie will not be without a forum if its petition is denied. First, it could have, under 25 C.F.R. Part 2, administratively appealed the BIA action in withdrawing approval of the lease and after any necessary appeal to the Interior Board of Indian Appeals eventually brought the action in United States District Court if required. 25 C.F.R. §§ 162.169-162.621. Second, if the action of the BIA violated the Constitution, statute, or regulation, it can bring an action for money damages in the United States Claims Court. 28 U.S.C. §§ 1491, 1505; *Bobula v. United States Department*

of Justice, 970 F.2d 854, 858 (Fed. Cir. 1992) (equitable relief sometimes available under Tucker Act when relief incidental to and collateral to claim for money damages). Third, Sun Prairie has, in fact, instituted another action in the United States District Court of South Dakota subsequent to the Eighth Circuit decision at issue in this case asking for certain declaratory and monetary relief.

The ruling addressed by the Sun Prairie petition will not undermine federal policy as suggested.

II. THE EIGHTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

The decision of the Eighth Circuit at App. A-6a, *Sun Prairie* petition, correctly set out the standard to be applied in determining prudential standing:

> In addition to the constitutional requirements, standing also involves prudential limits on the exercise of federal jurisdiction. *Bennett*, 520 U.S. at 162. Prudential limits require a plaintiff to show the grievance arguably falls within the zone of interests protected or regulated by the statutory provision invoked in this suit. *Id.*

Sun Prairie, while agreeing that the court of appeals correctly stated the legal standard, claims that the court "misapplied the zone of interest test" and for that reason urges this Court to grant its petition for certiorari.[7]

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7. The petition argues that the standing issue was not raised in the lower court. The standing issue was raised as soon as the Tribe became realigned. Standing requirements must be satisfied at every (Cont'd)

25 U.S.C. §§ 81 and 415 were designed to protect Indian tribes, not commercial entities seeking to utilize Indian lands and the concomitant freedom from state jurisdiction to generate profits. 25 U.S.C. § 81 specifically directs that no agreement be approved that violates a federal law such as NEPA; 25 U.S.C. § 415 gives the BIA virtually unfettered discretion to approve leases of Indian land and specifically directs that consideration be given to the effect on the environment of the uses to which the land will be subject. *See Davis v. Morton*, 496 F.2d 593, 596 (10th Cir. 1972) (EIS required prior to construction of housing development); *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977).

Sun Prairie argues that the legislative history of 25 U.S.C. §§ 81, 396, and 415-415(d) establishes that, as a commercial enterprise, it possesses "at least some" interest arguably protected under those statutes. The interest identified apparently is its effort to further economic development and to prevent economic dislocation on Indian lands by unauthorized tribal or federal action. Neither the statutory language or legislative history shows that the statutes were enacted to protect and benefit anyone other than Indian tribes. No case discussing standing under those statutes has reached the conclusion urged by Sun Prairie. A trustee of Indian lands, such as the BIA under the facts of the present case, cannot have duties to protect the interest of a conflicting party.

(Cont'd)
stage of a federal court proceeding, from the initiation of the suit to its final review in this Court. When a standing issue is present, this Court has given serious attention to the matter even if not raised by the parties or passed upon by the courts below. *Lewis v. Casey*, 518 U.S. 343, 349 n. 1 (1996); *United States v. Hays*, 515 U.S. 737, 742 (1995); *Juidice v. Vale*, 430 U.S. 327, 331 (1977); and *O'Shea v. Littleton*, 414 U.S. 488, 493-498 (1974).

See Navajo Nation v. United States, 263 F.3d 1325, 1332 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 2326. The BIA was required to protect the land to be affected by the hog production facility and entitled to withdraw the lease in order to guarantee that protection.

A review of 25 U.S.C. §§ 81 and 415 indicates not even a glimmer of intent that either statute was designed to protect commercial entities or place them within any zone of interest to be regulated or protected. This conclusion has been reached by the many cases addressing the same issue. *Schmit v. Int'l. Finance Mgmt. Co.*, 980 F.2d 498 (8th Cir. 1992); *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1056 (10th Cir. 1993); *Webster v. United States*, 823 F. Supp. 1544, 1550 (D. Mont. 1992), *aff'd*, 22 F.3d 221 (9th Cir. 1994); *San Xavier Dev. Auth. v. Charles*, 237 F.3d 1149, 2252-53 (9th Cir. 2001).

While recognizing the holdings of the above cases, Sun Prairie maintains that the cases have no application once a lease has been approved. However, Sun Prairie cites no cases dealing with 25 U.S.C. §§ 81 or 415 to support its position. Moreover, even if Sun Prairie's analysis were correct, under the facts of this case it would be a distinction without difference. The lease in this case was approved on September 16, 1998. On November 23, 1998, an action was instituted in the District of Columbia to set aside the approval. There had been an EA conducted prior to lease approval where critical comments were made, including those of Intervenors, about the need for an EIS. On September 4, 1998, an administrative appeal had been attempted concerning the FONSI. The EPA had submitted its critical comments on the EA. Thus, while formal approval was given on September 16, 1998, Sun Prairie was on notice that the formal approval

was under attack and not likely to stand. Regardless of the approval given, Sun Prairie knew or should have known that the approval would be withdrawn and cannot now complain that it proceeded with construction at great risk. In view of the knowledge that Sun Prairie possessed, it could be treated the same as a party without lease approval.

REASONS FOR DENYING THE PETITION

First, Sun Prairie has not established that the Eighth Circuit decision conflicts either with the decision of this Court or of another circuit court. The decision being questioned is consistent with case law of other circuits. Second, there is no important question of federal law that should be decided by this Court. Economic development on Indian reservations is not threatened, and the unusual facts of this case are not likely to occur again in the future. Third, the Eighth Circuit decision correctly stated the rule of law pertaining to prudential standing and at most this case involves only a misapplication of a properly stated rule of law. Sup. Ct. R. 10. Fourth, there are factual issues pertaining to whether Sun Prairie knew or should have known that the BIA's lease approval was going to be withdrawn placing it in the same position as one without a lease. Fifth, the BIA made the correct decision in withdrawing approval of the lease until an EIS could be completed before construction of one of this country's largest hog production facilities. Review of the standing issue would not be a prudent use of judicial resources. Finally, although it is uncertain what decision the Assistant Secretary might make on a request for subsequent approval of the lease in question, if Sun Prairie has been damaged it has other forums available to make claim for money damages, including the suit currently pending in the United States District Court of South Dakota.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Supreme Court, U.S.
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No. 02-751

IN THE

Supreme Court of the United States

SUN PRAIRIE, A PARTNERSHIP,

Petitioner,

v.

NEAL A. McCALEB, ASSISTANT SECRETARY – INDIAN AFFAIRS, GALE A. NORTON, SECRETARY OF THE INTERIOR, ROSEBUD SIOUX TRIBE, CONCERNED ROSEBUD AREA CITIZENS, SOUTH DAKOTA PEACE AND JUSTICE CENTER, PRAIRIE HILLS AUDUBON SOCIETY, and HUMANE FARMING ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION OF CONCERNED ROSEBUD AREA CITIZENS, ET AL.

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RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Respondent non-profit organizations have no parent corporations and do not issue stock.

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STATEMENT OF THE CASE

The factory hog farm at issue in this case is partially constructed. Two of the planned 13 sites are now in commercial operation. If completed as planned, it will be one of the largest of its kind in the nation. Its hundreds of metallic buildings, sprawled over thousands of acres of the rolling grasslands of the Rosebud Sioux Reservation, will produce vast quantities of air, water, and solid waste pollution, including more than a million gallons of animal wastewater, and more than a ton of animal carcasses, each day.

Despite the project's tremendous environmental impacts, Sun Prairie was able to persuade regional Bureau of Indian Affairs ("BIA") officials to approve its lease with the Rosebud Sioux Tribe ("the Tribe") without preparing an environmental impact statement ("EIS") under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). Local residents concerned with the associated health and environmental issues formed Respondent organization Concerned Rosebud Area Citizens in order to challenge the lease approval. In 1998, this group, joined by the other organizations identified in the caption (hereinafter collectively "Citizens"), filed suit in the U.S. District Court for the District of Columbia seeking preparation of an EIS under NEPA.

After receiving the Plaintiffs' complaint and motion for a preliminary injunction, the government determined that its position in the suit was legally untenable, since an

EIS was undeniably required by NEPA.[1] In consultation with Sun Prairie and the Tribe, BIA Director Gover decided to rescind the lease approval and begin preparation of an EIS. He expressed confidence that the project could go forward as soon as the environmental issues had been addressed.[2]

Opposed to the preparation of a complete environmental analysis of the project, Sun Prairie continued to invest heavily in the hog farm while it instituted a new suit against the government. It won a series of injunctive orders from the District Court for South Dakota, culminating in a permanent injunction against governmental interference with the project. Pet. App. B. After the government and Citizens filed appeals of this injunction, the Tribe reconsidered its relationship with Sun Prairie and the hog farm. Having experienced first hand the environmental impacts of the first phase of the project, the Tribe declared its opposition to its completion, and obtained leave from the Court of Appeals to realign with Appellants BIA and Citizens, leaving Sun Prairie as the sole Appellee.

The same week, Citizens filed a brief with the Court of Appeals challenging Sun Prairie's standing to sue. Citizens asserted that Sun Prairie could not demonstrate that it had an interest that would satisfy the "zone of

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1. *See* BIA's recission letter, Pet. App. E at 70a ("[the lease approval] is, and always has been, void for failure to fully comply with NEPA.").

2. *See* Pet. App. E at 70a ("I encourage you to resubmit a proposal ...").

interests" protected by any federal statute. Sun Prairie dismissed this contention as "another incredible assertion" by Citizens, arguing that its economic stake in the project enjoyed legal protection under at least four federal statutes. This ambitious claim of standing was rejected by the Eighth Circuit Court of Appeals in a unanimous opinion by Chief Judge Hansen, former Chief Judge Wollman, and Judge Bye. Pet. App. A.

The company submitted a petition for rehearing *en banc* in which it abandoned its formerly expansive standing claims in favor a much more limited and fact-specific approach. In the rehearing petition, Sun Prairie argued that it could establish its prudential standing because it had been specially aggrieved by the government's initial approval – followed by its disapproval – of the lease. The Eighth Circuit disagreed; the petition for rehearing *en banc* was denied. Pet. App. C. at 59a.[3/]

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3. At oral argument, the government agreed with Citizens that Sun Prairie did not satisfy the applicable standards for prudential standing.

REASONS FOR DENYING THE WRIT

1. This Case is of No National Importance Because the Legally Relevant Facts Are Extraordinary, Unprecedented and Highly Unlikely to Recur

Sun Prairie asserts, as it must, that the outcome of this case is important to the future of economic development in Indian Country, pointing particularly to a statute enacted after this case was filed. Pet. at 11-13. Nothing could be further from the truth. Indeed, it would be hard to imagine a case with a narrower focus or less important implications for those who would do business with tribes in the future.

On its face, the Petition raises only a single, factually circumscribed issue: whether one who has executed a lease with a Tribe and received the government's blessing has prudential standing to sue if the government's blessing is subsequently abrogated. The Petition does not raise any of the following, more important issues:

– whether future non-Indian contractors who find themselves in a similar position would have a cause of action against the government; that issue was raised below and not addressed by the Eight Circuit;

– whether non-Indians who execute agreements with Indian tribes in the future will have prudential standing to challenge a threshold disapproval of such agreements by BIA; Sun Prairie no longer challenges the rule barring standing in such cases;

– whether non-Indian contractors in a similar position would have legal recourse against the Indian tribe.

The facts in this case are unique, due to the circumstance of the 1998 lawsuit by Citizens that forced the government to rescind its approval of the lease. Sun Prairie has pointed to no past situations involving similar circumstances, nor has it predicted that similar situations will arise in the future. Such a prediction would be highly speculative at best, particularly since this case provides a lesson to others – *i.e.*, that resisting the preparation of a required environmental analysis will likely lead to protracted litigation.

Evidence that a similar alignment of circumstance is unlikely to recur can be found in the observation that similar facts have never occurred previously, judging from the case law. Here the pertinent law goes back more than 200 years. Federal approval of leases between non-Indians and Indian tribes has been statutorily mandated since President Washington signed the Act to regulate Trade and Intercourse with Indian Tribes and to preserve Peace on the Frontiers, §12, 1 Stat. 469, 472 (1796). Litigation against the government in connection with its lease approval powers dates back at least to the 19th century. *See, e.g.*, *In re Sanborn*, 148 U.S. 222, 227 (1893). While the Department of the Interior has approved and disapproved countless leases, legal disputes in this area have been extremely rare; research reveals approximately a dozen reported court decisions. In some cases, non-Indians pursuing contracts with tribes have

sued to compel BIA's approval thereof.[4] In others, litigants have attempted to overturn BIA's approval of contracts between a tribe and a third party.[5] No reported cases, however, present facts in any way similar to the facts of this case.

Sun Prairie's claim that this case has important implications for the future of Indian commerce is easily shown to be overstated. Businesses considering ventures on the reservation are concerned with real-world economic matters such as (1) availability of materials and access to markets, since many reservations are remotely situated, (2) the proximity and size of a trained labor force, and (3) questions of infrastructure, such as fire protection services. It is barely conceivable that these cost-benefit-risk calculations would be influenced by the availability of prudential standing to sue should their contracts be rejected by the government.[6] It is even less conceivable, moreover, that such calculations would consider the narrow question presented in this case -- whether prudential standing can be established should the

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4. *See, e.g., Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052 (10th Cir. 1993).

5. *See, e.g., Schmit v. International Finance Management Co.*, 980 F.2d 498 (8th Cir. 1992) (*per curiam*).

6. Non-Indian companies who negotiate legal arrangements with Indian tribes are well aware that the immunities enjoyed by both native sovereigns and the federal sovereign pose substantial legal risks. *See Gray v. Johnson*, 395 F.2d 533, 537 (10th Cir.), *cert. denied*, 392 U.S. 906 (1968) (government agencies interact with the public subject to limitations on their legal liability, "and one who deals with them assumes the risk that they are so acting.").

government first approve the agreement, and then reject it. In sum, the uniqueness of the facts in this case make it difficult to conceive of a case that would be less important to anyone not a party to it.

2. The Question Presented in the Petition Was Raised for the First Time in Sun Prairie's Petition for Rehearing *En Banc*

The law governing judicial review of federal rejection of Indian contracts is dominated by one over-arching rule: non-Indians may not sue to redress alleged wrongdoing by BIA because it was the Indians, not their trading partners, who were intended by Congress to benefit from the federal statutes requiring oversight. *See* Section 3, *infra*. The Petition acknowledges this dominant rule, but spins it by stating that in "some jurisdictions" a "would-be lessee" (*i.e.*, a party whose lease is disapproved on first review) lacks prudential standing to challenge the government's disapproval thereof. Pet. at 14.

The Petition goes on to assert, however, that the issue presented by the instant case is fundamentally different:

> "[o]nce the lease is approved, however, that status changes fundamentally. At that point the non-Indian party has become an actual lessee and is therefore actually regulated by the suite of statutes and regulations that control the lease."

Id. at 15. In other words, the issue that Sun Prairie has presented to this Court is a narrow subset of the larger question of the prudential standing of non-Indian

contractors generally. The Question Presented in the Petition reflects the same narrow focus:

> Once a lease of Indian lands to a non-Indian party has received federal approval under 25 U.S.C. §§ 81 and 415, does that non-Indian party have prudential standing to challenge a federal agency's attempt to void the lease by unilaterally withdrawing the previous federal approval.

Pet. at 1 (emphasis added).

Sun Prairie's argument for an exception to the over-arching rule denying standing to non-Indians suffers from a number of infirmities, including, as discussed below, that it conflicts with all the pertinent judicial authorities. For present purposes, however, its chief problem is that this issue was not presented to the Court of Appeals until rehearing *en banc* was sought. In its brief and at oral argument, Sun Prairie attacked the over-arching rule without addressing the exception to that rule that it seeks here. Sun Prairie's rejoinder to Citizens' challenge to its standing was simple, clear and brief: Citizens were just plain wrong. According to Sun Prairie, the case law barring standing to non-Indians was similarly wrong. In its brief Sun Prairie did not acknowledge the validity of the overarching rule, but challenged it head on.[7] Indeed, Sun Prairie claimed boldly that its interests in the factory hog farm fell "squarely" within the zones of interest protected by four independent statutory regimes, including

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7. Sun Prairie Br. at 15-18.

"25 U.S.C.," NEPA, the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* ("NHPA"), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA").

Obviously, Sun Prairie did not properly understand this issue. No serious argument can be made that Sun Prairie's economic interests in the hog farm enjoy congressional protection under the NHPA or the APA. What matters here, however, is that the argument was sketched in such bold, broad, and crude strokes that it never served to put the Court of Appeals, or the parties, on notice of the subsidiary standing issue this is the sole subject of the Petition. Sun Prairie never made any of the fine distinctions and elaborate policy arguments that support its current effort to establish a small island of standing in a sea of non-reviewability. It is therefore not surprising that the opinion of the Circuit Court did not reference Sun Prairie's new, nuanced distinction between governmental disapprovals of contracts and governmental recission of past approvals. This distinction, now described as "fundamental," was obscured to the point of invisibility before the Court of Appeals – until, that is, rehearing *en banc* was sought.

After the Court of Appeals' decision was handed down, Sun Prairie had a new appreciation for the significance of the standing issue. In its rehearing petition, Sun Prairie adopted the same modest and narrowly-circumscribed argument that appears in the Petition.

Sun Prairie's standing argument matured too late. This Court's decisions make it clear that a party seeking certiorari must have first given the court below a full

opportunity to draw out and analyze the issue, so that this Court's consideration can be informed by a record. *See United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to entertain an issue on which the courts below did not focus); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400 n. 7 (1996) (declining to entertain a newly refined argument on an issue that was decided below).[8] For this reason alone, issuance of the writ would be improvident.

3. The Decision Below is 100% Congruent With This Court's and All Other Precedents

The Court of Appeal's decision is in accord with all prior court decisions regarding the standing of aggrieved

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8. Sun Prairie argues in a footnote that the Court of Appeals should have rejected Citizens' prudential standing argument for failure to have raised it at the District Court level. *See* Petition at 8, n.7, *citing Pershing Park Villas Homeowners Assn. v. U.S. Pacific Ins. Co.*, 219 F.3d 895 (9th Cir. 2000). This is another argument that was presented to the Court of Appeals, for the first time, in its petition for rehearing *en banc*. The better weight of authority suggests that prudential standing arguments cannot be waived. *See, e.g., Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994).

In any event, it would have been pointless to have challenged Sun Prairie's standing before the District Court, where it remained aligned with the Tribe, a clearly eligible litigant. *See National Wildlife Federation v. ASCS*, 955 F.2d 1199, 1208 (8th Cir. 1992) (in the 8th Circuit, where one plaintiff exhibits standing to sue, the standing of other plaintiffs should not be challenged). It was not until the Tribe realigned with Citizens and the government, during the appeal, that it was permissible to challenge Sun Prairie's standing.

non-Indian contractors, including (1) this Court's flagship ruling in *In re Sanborn*,[9] decisions by three courts of appeals,[10] and rulings by a number of district courts.[11] Moreover, the Interior Board of Indian Appeals, an agency entitled to deference in its interpretation of the Indian laws,[12] has consistently interpreted the laws requiring government approval of tribal contracts with non-Indians to preclude non-Indians from bringing legal action challenging governmental decisionmaking in this regard.[13]

In asking the Court to alter a century of case law, Sun Prairie draws strands from prudential standing decisions far outside the realm of Indian law. The cases relied upon,

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9. 148 U.S. 222, 227 (1893) (denying a cause of action to non-Indian contractor because the pertinent federal statutes were intended exclusively "to protect the Indians from improvident and unconscionable contracts.").

10. *See San Xavier Develop. Auth. v. Charles*, 237 F.3d 1149, 1152-53 (9th Cir. 2001); *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052 (10th Cir. 1993) (explicitly rejecting the precise "two-prong" standing argument offered here by Sun Prairie); *Schmit v. International Finance Management Co.*, 980 F.2d 498 (8th Cir. 1992) (*per curiam*).

11. *See, e.g., Utah v. U. S. Department of the Interior*, 45 F. Supp. 2d 1279, 1283 (D. Utah 1999), *aff'd on other grounds*, 210 F.3d 1193 (10th Cir. 2000).

12. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

13. *See, e.g., Utah v. Acting Phoenix Area Director, Bureau of Indian Affairs*, 32 IBIA 169 (1998); *Kombol v. Acting Assistant Portland Area Director*, 19 IBIA 123 (1990).

however, do not support the thesis. Granted, in some cases prudential standing has been recognized not just for parties who are the intended beneficiaries of a statutory provision, but also for those who are the "coincidental" beneficiaries thereof, *i.e.*, those whose interests align so well with the purposes of the statute in question that they are accorded the same status as the intended beneficiaries.[14/] But this rationale, and these cases, are clearly inapposite here. Sun Prairie has no interests that are protected by 25 U.S.C. § 415; indeed, as a company accused of predatory dealings with Indians, it is a quintessential target of the law. Judicial recognition of a non-Indian contractor's prudential standing would subvert the essential goals of this Indian-protective statutory regime.[15/] It would also usurp Congress' historic, primary role in policing and updating the law governing commerce between Indians and non-Indians.[16/]

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14. *See, e.g., National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479 (1998) (competitors of regulated financial institutions have prudential standing to challenge agency action relaxing statutory restrictions on the activities of those institutions"); *Clarke v. Securities Industry Assn.*, 479 U.S. 388 (1987) (same).

15. *See Clarke, supra*, 479 U.S. at 397 n. 12 (prudential standing must be denied "those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.").

16. In recent amendments to 25 U.S.C. § 81, Congress elected not to alter the rules regarding judicial review. Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. 106-179.

4. Even if This Court Were to Remand, The District Court's Decision Would be Reversed on the Merits

Even if this Court were to grant the writ and reverse the Eighth Circuit's standing decision, it is virtually certain that on remand the District Court's injunction would be overturned on the merits. In their briefs to the Eighth Circuit, the government, the Tribe and Citizens raised a great number of compelling reasons why the District Court's order was legally infirm. Specifically, they alleged that the order was defective because:

– the District Court issued a permanent injunction against government interference with the project, when the only permissible remedy was a remand to the agency;

– the District Court grounded its decision on the fact that neither BIA Director Gover nor his senior staff had personally read every page of the administrative record, *id.* at 34a;

– the District Court found the government -- the defendant in the case -- guilty of laches, *id.* at 39a-40a;

– although judicial review in this administrative law case is confined to the administrative record, the District Court conducted a two-day trial on the substantive environmental issues, *id.* at 21a-22b and n. 3.;

– the District Court enjoined Citizens from opposing the hog farm project, even though Citizens had not been named in any pleading or motion, *id.* at 57a.

Several of the appellants' argument are independently sufficient to justify reversal of the District Court's order. Therefore, it is highly unlikely that granting the writ will lead to a different outcome in the final analysis.

CONCLUSION

The facts in this case are *sui generis*, making it virtually inconceivable that a ruling by this court on the standing issue will have implications for anyone except the parties. Because the question presented in the Petition was not considered below and, indeed, has never been considered by any other court, Sun Prairie would put this Court in the difficult position of making new law on the basis of the most meager of judicial records. Even if this Court were to reverse the well-reasoned and legally-precedented decision of the Court of Appeals, the multiple infirmities of the District Court's decision all but assure that it will be vacated, and that Sun Prairie will not ultimately obtain the relief that it seeks in this case. For these reasons the writ should be denied.

Dated: January 15, 2003

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Supreme Court, U.S.
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No. 02-751

IN THE

Supreme Court of the United States

SUN PRAIRIE, A PARTNERSHIP,

Petitioner,

v.

AURENE M. MARTIN, ACTING ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, GALE A. NORTON, SECRETARY OF THE INTERIOR, ROSEBUD SIOUX TRIBE, CONCERNED ROSEBUD AREA CITIZENS, SOUTH DAKOTA PEACE AND JUSTICE CENTER, PRAIRIE HILLS AUDUBON SOCIETY, and HUMANE FARMING ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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1. The Federal Defendants[1] concede that "[t]he court of appeals . . . did not properly apply" the prudential standing principles which this Court has set out, and that "[t]he court of appeals' decision is accordingly mistaken." Fed. Br. in Opp. at 6. They concede that, although non-Indians who are only would-be lessees generally do not have standing under the statutory provisions at issue, "the court of appeals erred, however, in failing to recognize the significantly different situation that arises once the Interior Department has formally approved a proposed lease, but then withdraws its approval." *Id.* at 8. They admit that "when the Interior Department makes the decision to withdraw a previous approval of a proposed lease, the Interior Department does so in the face of the ripened expectations of both the Indian lessor and the non-Indian lessee who may have taken action or made financial commitments based on the approval," and that, "[i]n those circumstances, it is reasonable to conclude that Congress intended that the non-Indian lessee may seek judicial review of the Interior Department's withdrawal decision." *Id.* at 8-9. They state that "the court of appeals erred in concluding that petitioner lacked prudential standing to pursue its claim," they "submit[] that the court of appeals should not have relied on prudential standing as a basis for dismissing petitioner's complaint," and they agree that what should have happened is that the court of appeals should have "recognize[d] its error and decide[d] the merits of whether the Interior Department acted lawfully in withdrawing its approval." *Id.* at 9.

Despite all of the above, however, the Federal Defendants assert that the court of appeals' error does not warrant this Court's review because "this Court does not ordinarily grant

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1. Pursuant to this Court's Rule 35.3, a current officeholder has again been substituted in the caption.

review to examine a court of appeals' application of settled legal principles to a particular factual situation," and there is "no reason to do so in this case, which presents highly unusual facts that are very unlikely to recur." *Id.* at 10.

In fact, however, there are important reasons for the Court to grant review. Although the Federal Defendants suggest that the case merely involves "application of settled legal principles," they also concede that "the court of appeals itself did not identify any controlling precedent," *id.* at 9, and indeed themselves assert that the court of appeals was "faced with the absence of controlling precedent," *id.* at 10. If the cases of this Court cited by petitioner are not "controlling precedent," then the principles are not settled, at least not enough for a court of appeals to apply them correctly. And if the principles are settled by previous decisions of this Court, then, as the Federal Defendants elsewhere concede, they are precedents "requiring the federal courts" to follow them, *id.* at 6, and the court of appeals' decision failing to follow them here is in conflict with those precedents, and that conflict should not be allowed to stand.

Moreover, the pertinent facts here are not "highly unusual." The facts pertinent to the question presented are that a party required by federal law to obtain government approval obtained that approval. The question is whether such a party, who concededly has Article III standing, has prudential standing under that same federal law to complain if it believes that approval was improperly revoked? It is no comfort to such a party – or to a prospective investor who must obtain such approval – for the government to say it will not need to worry about standing most of the time because it will not be harmed if the government does not withdraw the approval. The question is what right to complain

will such a party have in those events when it is so harmed, and the answer given by the court of appeals currently is "none."

Tellingly, the Federal Defendants do not disagree that "this case may discourage non-Indian investment and depress economic development in Indian country." *Id.* at 11. They merely "do not believe that that concern warrants review of the issue presented here in the present circumstances, especially in the absence of a circuit conflict." *Id.* In addition to showing a remarkable lack of concern for investment and economic development in Indian Country in the seven states and approximately 30 reservations within the Eighth Circuit, the Federal Defendants discount the conflict with the precedents of this Court that they otherwise concede are controlling and the chilling effect that a denial of review of this decision would have on investment and development in those parts of Indian Country lying outside the circuit as well.[2]

Moreover, even if "the present circumstances" really did counsel against full review, there would be no need to jeopardize that investment and development. Where, as here, the federal government has conceded error on the part of the lower court, summary disposition of the case, reversing the standing decision and remanding for a determination of the merits, would be entirely appropriate. *See* Sup. Ct. R. 16.1. The parties would then be able to obtain the merits disposition to which most of the arguments of the Intervenor Defendants

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2. Whether petitioner does or does not succeed in a separate suit asserting a Due Process violation, *see* Fed. Br. in Opp. at 11, will not change the court of appeals' erroneous prudential standing decision or alter its chill on investment and development. Moreover, the Federal Defendants fail to inform the Court that they have already moved to dismiss that action.

and the Tribe are directed, and the incorrect prudential standing decision of the court of appeals would not continue to stand as a precedent that even the federal government concedes is wrong.

2. The Intervenor Defendants claim the appellate court was somehow not fully "put on notice" regarding the standing issue that is the subject of this Petition. This assertion is completely baseless,[3] and is notably not joined in by the Federal Defendants. Sun Prairie's standing was not challenged before the District Court. The issue of prudential standing was first raised on appeal by the Intervenor Defendants, as but one of a host of arguments.[4] Sun Prairie asserted that it possessed prudential standing and was within the "zone of interest" of Title 25 of the United States Code

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3. The authority relied upon by the Intervenor Defendants provides no support for their argument. In *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998), the Court determined the merits of the question before it and then remanded for further factual findings regarding the extent of a parent company's operation of its subsidiary, an issue which had not been examined by the district court, and in *Holly Farms Corp. v. N.L.R.B*, 517 U.S. 392, 400 n.7 (1996), the Court declined to address Holly Farms' attempt to redefine on appeal the type of farming in which it was engaged. Neither of these cases involved standing issues or how they were addressed below. And even if they were merely cited for the more general point that the Court does not usually address arguments that were not the basis for the decision below, here prudential standing was the explicit and sole basis for the Eighth Circuit's decision.

4. As noted in the Petition (at 8 n.7), if anything it is the Intervenor Defendants' argument regarding standing, not Sun Prairie's defense thereof, that "matured too late." *See Pershing Park Villas Homeowners Assn. v. United Pacific Ins. Co.*, 219 F.3d 895, 899-900 (9th Cir. 2000).

in its initial brief as appellee (Sun Prairie Br., Nov. 1, 2000, at 16-18) and again in its petition for rehearing. The appellate court was well aware of the question presented in this Petition, including particularly the fact that Sun Prairie was an actual lessee objecting to withdrawal of a previous federal lease approval,[5] but, as the Federal Defendants agree, simply got the answer wrong.

3. The Tribe claims that Sun Prairie has "no interest or stake" in Indian land other than a devious intent to pollute the environment. Tribe Br. in Opp. at 1. This averment is both false and disappointing. The Tribe ignores Sun Prairie's interest in the Lease[6] and in its substantial investment in the Project, which was the culmination of a business relationship

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5. *See, e.g.*, Ct. of App. Opinion, Pet. App. 2a-3a:

> This case arises from the Rosebud Sioux Tribe's lease of land to Sun Prairie. . . . Because the lease covers land included within the Rosebud Indian Reservation, the Bureau of Indian Affairs (BIA) had to review and approve the lease. . . . BIA . . . approved the lease, which the Tribe and Sun Prairie executed. Almost five months later, the former Assistant Secretary for Indian Affairs . . . voided the lease. . . . Sun Prairie and the Tribe filed suit. . . .

6. The Tribe goes so far as to say that if a federally approved lease on Tribal land faces any questioning or opposition, even after the time to challenge that lease by appeal has expired, the non-Indian party should be treated as if it lacked a valid lease (*Id.* at 15-16). If that is the "lesson" to be drawn from this case, any unhappy individual can, by complaint or merely by a disapproving letter, immediately arrest the contractual rights of non-Indian lessees – a proposition that will certainly chill any potential investor from leasing Indian land.

solicited by the Tribe after a detailed Needs Assessment, contained in the record below,[7] in which the Tribe itself (years before it approached Sun Prairie) determined that a hog farm was a developmental opportunity that should be pursued. The Tribe admits that it initially supported the Project. *Id.* at 5 n.2. In fact, it executed the Lease and joined Sun Prairie before the district court to ask for a permanent injunction to prevent interference with the Lease, which injunction was ultimately granted. The Lease was in effect for well over a year – and millions of dollars were spent on development – before a new Tribal administration decided that it no longer wished be bound by the Lease's terms. It is not uncommon for government administrations to change; but such change does not impact the contractual obligations entered into by a previous administration. Likewise, a change in the political winds should not impact a non-Indian party's standing to defend a contract between itself and the Tribe that has been executed and federally approved.

4. The authority the Intervenor Defendants and the Tribe rely upon to support their prudential standing analysis is, in large part, a reiteration of cases that were previously referenced in the Eighth Circuit's opinion and which Sun Prairie has previously distinguished. *See, e.g.*, Pet. at 18 n.10. One new citation offered by the Intervenor Defendants is *In re Sanborn*, 148 U.S. 222, 223 (1893), but that case is completely inapposite here. *In re Sanborn* involves the availability of an appeal to this Court from an interim advisory decision of the Court of Claims in a pending agency proceeding. It does not address the revocation of a federal approval under Title 25 of the United States Code, nor does it address issues of prudential standing.

7. Admin. Rec., Vol. 1 at 280 (Rosebud Sioux Tribe Municipal, Rural, and Industrial Water Needs Assessment Final Report, July 1993, at § 5.1.2.2).

5. The Tribe and the Intervenor Defendants take great liberties in their descriptions of the genesis of the Project and its operation – and cast aspersions regarding Sun Prairie's motives – referring primarily to "facts" that are not in the record or that address the merits but not the question presented. As noted above, the facts pertinent to the question presented are few, clear, and uncontested: The BIA, acting under its delegated authority under 25 U.S.C. §§ 81 and 415, approved the Lease on September 16, 1998; and then, to resolve a third-party lawsuit in which neither the Tribe nor Sun Prairie were parties, attempted unilaterally to revoke its approval and void the Lease on January 27, 1999.

Beyond that, a sufficient response is to note that the facts underlying the merits of this case have already been examined and determined at length by the district court. *See* Pet. App., 18a-22a (genesis and development of the Project); 40a to 56a (sufficiency of the environmental review performed on the Project). The Intervenor Defendants argue that Sun Prairie is unlikely to win this case on the merits, but the district court – the only tribunal to reach the merits of this case – after reviewing the record and conducting a two-day evidentiary hearing, found in favor of Sun Prairie's claims, holding, among other things, that the Assistant Secretary's attempt to void the lease was "untimely and thus invalid" (Pet. App. at 31a), that the Assistant Secretary's letter purporting to void the lease was "conclusory and offered absolutely no legal analysis or factual explanation" (*id.*), that the Assistant Secretary "had no authority to reconsider the FONSI and void the lease" (*id.* at 32a), and that the environmental review performed on the Project was sufficient (*id.* at 55a-56a).

The broad implications of this case were also acknowledged by the district court:

> [T]he failure of this project based on administrative ineptitude and procedural unfairness would absolutely deter private entities and lending institutions from pursuing economic relationships with various tribes.
>
> * * *
>
> It is high time that the BIA conduct its affairs in a timely and business-like manner to give confidence to Tribes, all Native Americans, their business partners, and lending institutions so that they can rely upon the BIA to do what they say they are going to do. The principles of equity dictate that the Assistant Secretary's decision cannot be upheld.

Pet. App. at 36a-37a and 40a (internal quotations omitted). The district court correctly recognized that the value of any lease or contract becomes ephemeral and its term becomes superfluous if the federal government can void it at will and without challenge.[8] It is both reasonable and likely that such uncertainty will chill investment on Indian land. Even the Intervenor Defendants admit (albeit in a separate context) that this case "provides a lesson to others." *Id.* at 5.

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8. The fact that the Tribe has a functioning tribal court with a full-time staff (Tribe's Br. in Opp. at 12) provides particularly little comfort where, as here, the arbitrary and capricious action is taken by the federal government – not the Tribe.

Both Sun Prairie and the Federal Defendants agree that Sun Prairie has prudential standing and that the Eighth Circuit erred in not so holding. That prudential standing question is all that is at issue on this Petition, and it is clearly and squarely presented. The court of appeals' answer to that question conflicts with the standing principles set out by this Court, and failure to address and correct that answer will have an important and deleterious effect on investment in and development of Indian lands.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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